Chapter Five: The Public Interest in Legal Services in the Court's Case Law

The previous chapters have focused on the way the Court protects the private interests of clients (Chapter Two and Chapter Three) and of lawyers (Chapter Four) in the provision of legal services.[1054] However, as noted in Chapter One, there is also a significant public interest in legal services because they are an essential component of the rule of law and the administration of justice. This chapter discusses the ways in which the Court reflects this public interest in legal services in its case law.

While the Court's case law based on private interests in legal services is certainly important, it arguably addresses the role of legal services only incompletely. The cases discussed in Chapter Two to Chapter Four may actually be the cases that concern less severe problems: Problems are isolated rather than endemic, lawyers exist, they meet certain minimum quality requirements, they take on cases, notwithstanding occasional problems. The issue, to use language developed to describe the Court's various functions, is largely individual rather than constitutional[1055] in that it concerns the provision of legal services in an individual case, rather than the availability of high-quality legal services generally, notwithstanding a certain amount of overlap.[1056] Ironically enough, it is the category of isolated problems, not that of more widespread problems, on which the Court has been most clear, even though for the fulfilment of human rights systemic problems impairing the legal services sector's ability to fulfil its functions are more dangerous than problems in individual, isolated cases.[1057]

This area is significantly more challenging to address from a human rights perspective than the protection of the private interests of clients and

1054 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1055 For this by now somewhat outdated debate see eg Steven Greer and Luzius Wildhaber, 'Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights' (2012) 12 Human Rights Law Review 655, as well as the references in Chapter Seven, n 1877ff.

1056 See eg cases such as *Golovan v Ukraine* App no 41716/06 (ECtHR, 05 July 2012), discussed in Chapter Two, 100ff, in which the Court criticised a general legislative arrangement.

1057 For an analysis and critique of the background to this approach see Chapter Seven.

lawyers. This is because, as will be discussed in detail in Chapter Eight, human rights are traditionally understood as primarily furthering the private interests of the rights holder. However, many of the points relating to the public interest are less closely linked to private interests. What if Bar associations are insufficiently independent and admit only 'politically reliable' lawyers to the profession?[1058] What if the provision of legal services is so unattractive economically that nobody chooses this career path?[1059] And what exactly is the position of lawyers if they are not part of the State but nonetheless have special abilities and responsibilities within the machinery of justice? These questions are not easily amenable to an analysis in terms of the position of individual rights holders. Nonetheless, despite being difficult to analyse within a traditional subjective human rights framework, the answers given to these questions determine whether or not legal services can fulfil the role which the Court clearly – as has been shown in Chapter Two to Chapter Four – accords to them. Simply ignoring them is not, therefore, an option.

Moreover, in keeping with a public-interest role for legal services, the Court, despite its focus on private interests, has shown a certain awareness that beyond individual lawyers there is an entire segment of society which deals in the provision of legal services. While this also surfaces in other contexts, it becomes particularly clear in the case law on freedom of expression for lawyers acting in individual cases.[1060] Although in both *Nikula v Finland* (2002)[1061] and *Steur v the Netherlands* (2003)[1062] the Court still focused on the impact of restrictions on the position of the lawyer concerned in that individual case, by the time of the 2005 Grand Chamber judgment in *Kyprianou v Cyprus [GC]* the Court had expanded its perspective. In *Kyprianou*, the Grand Chamber stressed that '[t]he imposition of a custodial sentence would inevitably, by its very nature, have a "chilling

1058 cf eg the Court's thinly veiled criticism in *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 49, where 'the Presidents of the disciplinary commission and the ABA openly criticised the applicant for his frequent appearances in the media and his affiliation to an opposition political party, which were not related to the subject matter of the disciplinary proceedings instituted against him'.

1059 As the Government alleged in *Appas v Greece (dec)* App no 36091/06 (ECtHR, 04 December 2008) 7, *Svintzos v Greece (dec)* App no 2209/08 (ECtHR, 24 September 2009) 4, would have happened for certain sparsely populated regions without a system limiting lawyers' standing on a regional basis.

1060 See Chapter Three, 154ff.

1061 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 54.

1062 *Steur v the Netherlands* App no 39657/98 (ECtHR, 28 October 2003), para 44.

effect", not only on the particular lawyer concerned but on the profession of lawyers as a whole'.[1063] Similarly, reference to 'la profession d'avocat dans son ensemble' has appeared in French-language cases,[1064] and in other cases and contexts the Court has referred to 'the independence of the legal profession from the State'.[1065] The Court consequently seems aware that there is a community of lawyers which is in some way important and goes beyond mere aggregation of the individuals who provide legal services.

This section therefore discusses the Court's case law focusing on the public interest in legal services. It begins with a discussion of the two most explicit lines of case law reflecting the public interest in legal services (I.), before turning to the more specific statements the Court has made on how States should regulate legal services (II.).

I. The 'special status of lawyers'[1066] as part of the 'very heart of the Convention system'[1067]

The Convention applies in a modified way where lawyers are concerned. Their status is somehow different from that of other individuals.[1068] Where lawyers themselves have applied to the Court, that much is clear from the ubiquitous emphasis in the case law on 'the applicant's status as an advocate',[1069] 'the applicant's status as a lawyer',[1070] the applicant's 'capacity as

1063 *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 175. See more generally on chilling effect Chapter Six, 335ff.

1064 *Pais Pires de Lima v Portugal* App no 70465/12 (ECtHR, 12 February 2019), para 64; *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019), para 71.

1065 cf the *Kamasinski* line of cases (discussed in Chapter Two, 126), *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989), para 65, see recently eg *X v the Netherlands* App no 72631/17 (ECtHR, 27 July 2021), para 47.

1066 *Nikula v Finland* (n 1061), para 45.

1067 *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669.

1068 For the conceptual problems related to such role-bearer rights see Chapter Eight, 419ff.

1069 *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 54.

1070 *Buzescu v Romania* App no 61302/00 (ECtHR, 24 May 2005), para 114; *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 146; *Ottan v France* App no 41841/12 (ECtHR, 19 April 2018), para 58; *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), para 215. See similarly *Kopp v Switzerland* App no 13/1997/797/1000 (ECtHR, 25 March 1998), para 75.

defence counsel',[1071] 'la qualité d'avocat du réquerant'[1072] or to their acting 'en sa qualité d'avocat'.[1073] Indeed, a number of cases contain separate sections separated by headings dedicated exclusively to determining whether the applicant is acting as a lawyer for Convention purposes.[1074] But what is this modified position?

If the title to the present subsection is a mélange of two different quotes, that is because the Court has two main text blocks regarding the more general importance of lawyers to the rule of law and the administration of justice. These, for the purposes of the present study, will be termed the *Nikula* dictum and the *Elçi* dictum, after the cases which popularised them, and read, respectively, as follows:

> The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.[1075]

The *Elçi* dictum reads as follows:

> The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential

1071 *Nikula v Finland* (n 1061), para 51. Distinguishing on this point see eg *Konstantin Stefanov v Bulgaria* App no 35399/05 (ECtHR, 27 October 2015), para 68.

1072 *Sagropoulos v Greece* App no 61894/08 (ECtHR, 03 May 2012), para 54; *Leotsakos v Greece* App no 30958/13 (ECtHR, 04 October 2018), para 42; *LP and Carvalho v Portugal* (n 1064), para 65.

1073 *François v France* App no 26690/11 (ECtHR, 23 April 2015), para 53; *Rodriguez Ravelo v Spain* App no 48074/10 (ECtHR, 12 January 2016), para 43; *Cazan v Romania* App no 30050/12 (ECtHR, 05 April 2016), para 41; *Laurent v France* App no 28798/13 (ECtHR, 24 May 2018), para 47; *LP and Carvalho v Portugal* (n 1064), para 67. Once again, the Court's diction is more consistent in the French than in the English versions of the cases.

1074 cf eg *Morice v France [GC]* (n 1070), para 146; *Ottan v France* (n 1070), para 58; *Čeferin v Slovenia* (n 1069), para 54. From the French-language case law see eg *Versini-Campinchi and Crasnianski v France* App no 49176/11 (ECtHR, 16 June 2016), para 75; *LP and Carvalho v Portugal* (n 1064), para 65. For a decision distinguishing the *Nikula* dictum on the basis that the applicant was not acting as a lawyer for Convention purposes see eg *Ursulet v France (dec)* App no 56825/13 (ECtHR, 08 March 2016), para 48.

1075 *Nikula v Finland* (n 1061), para 45.

> component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.[1076]

To this day, both of these quotes appear in the Court's case law.[1077] It is therefore worth paying closer attention to their development and use.

1. 'The special status of lawyers'[1078]

Arguably the core tenet of the *Nikula* dictum, taken from a 2002 judgment, is that '[t]he special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts'.[1079] This passage forms one of the central pillars of the Court's jurisprudence regarding legal services. But what is a 'special status' within the context of a human rights regime?[1080] Does the Convention not ostensibly simply oblige the High Contracting Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I' of the Convention,[1081] with the only relevant status that of being *homo sapiens*?

For context, and before proceeding to a more detailed inspection of the Court's jurisprudence on this matter, it is worth noting that the peculiar situation in which lawyers find themselves – as non-State actors providing a public service, replete with obligations both to their client and to more abstract ideals such as 'justice' or, more mundanely, the judicial system[1082] – is frequently reflected in domestic rules echoing this ambiguous position. In many domestic systems, this mid-way position has led to doctrines

1076 *Elçi and others v Turkey* (n 1067), para 669.
1077 The last citation of the *Nikula* dictum at the time of writing is *Rogalski v Poland* App no 5420/16 (ECtHR, 23 March 2023), para 39; the last citation of the *Elçi* dictum is *Namazli v Azerbaijan* App no (ECtHR, 20 June 2024), para 35.
1078 *Nikula v Finland* (n 1061), para 45.
1079 Ibid, para 45.
1080 See also Chapter Eight, 419ff.
1081 Art. 1 ECHR.
1082 Some of this terminology may also flow from the fact that the French 'la justice' denotes both abstract ideas of equity and the totality of organs tasked with applying the law, cf eg https://dictionnaire.lerobert.com/definition/justice, accessed 08 August 2024.

frequently translated into English as the idea that lawyers are 'officers of the court'.[1083]

This rationale holds true in the Convention context as well: As has already been shown in a variety of areas, lawyers' role of guiding non-State individuals through the State's legal system locates them at the intersection between the State and non-State spheres. Lawyers do not wield State power; yet their role as participants in the business of justice means that they are intimately linked to State functions, particularly where they have additional benefits such as particular rights or protection by a monopoly. Lawyers are in the peculiar situation of acting within the ambit of the State's obligation to ensure access to legal services,[1084] but nonetheless, according to the Court, being independent from the State, as is clear from the *Kamasinski*[1085]/*Czekalla*[1086]/*Siałkowska*[1087]/*Staroszczyk*[1088] line of cases,[1089] in which the Court also highlighted explicitly that lawyers are not State organs.[1090] As the Court put it in *Bigaeva v Greece* (2009):

> L'avocat exerce … une profession libérale qui est, pour autant, en même temps une fonction mise au service de l'intérêt public. Sur ce point, la Cour rappelle que sa jurisprudence relève cette particularité de la profession d'avocat : si elle admet, d'une part, que cette profession n'est pas assimilée à celle d'un poste dans la fonction publique … elle souligne, d'autre part, que l'avocat est un auxiliaire de la justice, ce qui entraîne des obligations spécifiques dans l'exercice de ses fonctions …[1091]

1083 Typically referred to as 'auxiliaires de la justice' in French, cf for the Court's case law eg *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987), para 46 b), although, at the domestic-law level, there are significant differences between the doctrines.

1084 Perhaps particularly clear ibid, para 46 (b): '[T]he contribution of avocats to the administration of justice involves them in the operation of a public service', or *Bigaeva v Greece* App no 26713/05 (ECtHR, 28 May 2009), para 39, cited below.

1085 *Kamasinski v Austria* (n 1065), para 65.

1086 *Czekalla v Portugal* App no 38830/97 (ECtHR, 10 October 2002), para 60.

1087 *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 99.

1088 *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007), para 121.

1089 See Chapter Two, 122ff.

1090 *Siałkowska v Poland* (n 1087), para 99.

1091 *Bigaeva v Greece* (n 1084), para 39 (citations omitted). 'Lawyers exercise a liberal profession which is, however, at the same time a function in the service of the public interest. On this point, the Court recalls that its case law notes this particularity of the profession of lawyer: if it admits, on the one hand, that this profession is not assimilated to that of a position in the civil service … it underlines, on the other hand, that the lawyer is an auxiliary of justice, which entails specific obligations in the exercise of his functions …' (author's translation).

In a nutshell, it may be that what the Court means by the *Nikula* dictum is a reception into the Convention environment of a similar doctrine on lawyers' ambiguous status. Although it has not expounded a comprehensive theory in this respect, the Court has clarified that it considers lawyers 'officers of the court',[1092] and that this brings with it special responsibilities. As the Fifth Section recently put it in *Namazov v Azerbaijan* (2020), concisely summarising the Court's case law on the point,

> [t]he specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct. Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court[.][1093]

The quote is noticeable for a number of reasons. For example, is it convincing that the specific status of lawyers (which would then somehow pre-exist) gives them a central position in the administration of justice as intermediaries between the public and the courts, rather than their central position as intermediaries giving them a specific status?[1094] Moreover, it is worth highlighting that while the Court directly sets out requirements – discreet, honest and dignified – which make lawyers 'subject to restrictions on their professional conduct', whether and to what extent lawyers will enjoy any corresponding 'exclusive rights and privileges' is left to the level of domestic law.[1095] Even this brief inspection shows that the doctrine seems to raise more questions than it answers. Nonetheless, the quote regarding the

1092 A term used at times in the Court's case law since *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994), para 46.

1093 *Namazov v Azerbaijan* (n 1058), para 46, with reference to *Morice v France [GC]* (n 1070), paras 132–33.

1094 Arguably, the phrasing in *André and another v France* App no 18603/03 (ECtHR, 24 July 2008), para 42, reprised in *Altay v Turkey (No 2)* App no 11236/09 (ECtHR, 09 April 2019), para 56, and *Särgava v Estonia* App no 698/19 (ECtHR, 16 November 2021), para 89, is rather more convincing, although it remains the exception rather than the rule: '[l]awyers occupy a vital position in the administration of justice and can, by virtue of their role as intermediary between litigants and the courts, be described as officers of the law', neatly reversing the chain of reasoning.

1095 And indeed, the extent to which lawyers have 'exclusive rights and privileges' varies drastically as between the Council of Europe States, with both the starting point that only lawyers may provide legal services and the starting point that anyone may provide legal services unless prohibited existing at the domestic level.

'special'[1096] (or 'specific')[1097] status of lawyers – an inconsistent translation of an expression that, in French, is consistently given as 'le statut spécifique des avocats'[1098] – has by now become a constant feature of the Court's jurisprudence.

1096 Cases using the 'special status' phrasing include *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018), para 35; *Kincses v Hungary* App no 66232/10 (ECtHR, 27 January 2015), para 34; *Reznik v Russia* App no 4977/05 (ECtHR, 04 April 2013); *Coutant v France (dec)* App no 17155/03 (ECtHR, 24 January 2008) 10; *Kyprianou v Cyprus [GC]* (n 1063), para 173; *Amihalachioaie v Moldova* App no 60115/00 (ECtHR, 20 April 2004), para 27; *A v Finland (dec)* App no 44998/98 (ECtHR, 08 January 2004) 11; *Wingerter v Germany (dec)* App no 43718/98 (ECtHR, 21 March 2002) 7; *Nikula v Finland* (n 1061), para 45; *Lindner v Germany (dec)* App no 32813/96 (ECtHR, 09 March 1999) 9; *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998), para 29; as well as *Peruzzi v Italy* App no 39294/09 (ECtHR, 30 June 2015), para 50, *Fuchs v Germany (dec)* App no 29222/11 (ECtHR, 27 January 2015), para 39, *Ignatius v Finland (dec)* App no 41410/02 (ECtHR, 17 January 2006) 5, *Böhm v Germany (dec)* App no 66357/01 (ECtHR, 16 December 2003) 4, *Steur v the Netherlands* (n 1062), para 36, which cite *Nikula v Finland* (n 1061) verbatim, and *Igor Kabanov v Russia* App no 8921/05 (ECtHR, 03 February 2011), para 52, *Furuholmen v Norway* App no 53349/08 (ECtHR, 18 March 2010) 10, which cite *Kyprianou v Cyprus [GC]* (n 1063) verbatim.

1097 Cases using the 'specific status' phrasing include *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* App no 68273/14; 69271/14 (ECtHR, 22 December 2020) (n 1077), para 88; *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 78; *Correia de Matos v Portugal [GC]* App no 56402/12 (ECtHR, 04 April 2012), para 139; *Radobuljac v Croatia* App no 51000/11 (ECtHR, 28 June 2016), para 60; *Morice v France [GC]* (n 1070), para 132.

1098 *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* (n 1097), para 88; *Tuğluk and others v Turkey (dec)* (n 1096), para 35; *Tuheiava v France (dec)* App no 25038/13 (ECtHR, 28 August 2018), para 33; *Correia de Matos v Portugal [GC]* (n 1097), para 139; *Cazan v Romania* (n 1073), para 41; *Rodriguez Ravelo v Spain* (n 1073), para 40; *Morice v France [GC]* (n 1070), para 132; *Mor v France* App no 28198/09 (ECtHR, 15 December 2011), para 42; *Gouveia Gomes Fernandes and Freitas e Costa v Portugal* App no 1529/08 (ECtHR, 29 March 2011), para 46; *Alfantakis v Greece* App no 49330/07 (ECtHR, 11 February 2010), para 27; *Coutant v France (dec)* (n 1096) 10; *Foglia v Switzerland* App no 35865/04 (ECtHR, 13 December 2007), para 85; *Kyprianou v Cyprus [GC]* (n 1063), para 173; *Amihalachioaie v Moldova* (n 1096), para 27; *Nikula v Finland* (n 1061), para 45; *Mattei v France (dec)* App no 40307/98 (ECtHR, 15 May 2001) 14; *Schöpfer v Switzerland* (n 1096), para 29.

(a) Casado Coca *and the origins of the* Nikula *dictum*

While the Court now uses it as something of a panacea, the statement originally goes back to the rather specific context of the 1994 case *Casado Coca v Spain*. *Casado Coca* concerned domestic rules largely prohibiting advertising by lawyers, a prohibition that was common to many jurisdictions at the time, although most of these have subsequently relaxed their rules to some extent.[1099] The applicant, a Barcelona-based lawyer, had placed advertisements in several newspapers and had also written directly to companies to offer them his services.[1100] Spanish law as in force at the time, however, contained a prohibition on lawyers' advertising.[1101] This led to disciplinary sanctions against the applicant,[1102] against which he applied to the European Commission of Human Rights, which in a nine-nine split[1103] decided that there had been a breach of Art. 10.[1104]

The first major point of controversy between the Parties – after the Court had established that Art. 10 could, in principle, cover commercial expression[1105] – was whether the ban on advertising pursued one of the legitimate aims listed in Art. 10 § 2 ECHR. The Government and Commission considered that the ban was intended to protect the rights of the public and of other members of the Bar, and therefore served the 'protection of

1099 And indeed in *Casado Coca v Spain* (n 1092) itself the Court at para 23 made reference to a draft law liberalising these rules, as well as a general tendency already noted by Judge Pettiti in his concurring opinion in *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985).

1100 *Casado Coca v Spain* (n 1092), para 7. According to the Commission's findings '[t]he applicant's notice set out particulars that were wholly neutral (his name, occupation and business address and telephone number) and did not contain information that was untrue or offensive to fellow members of the Bar', ibid, para 49. The Court did not examine the letters directly addressed to clients separately, although in some jurisdictions this type of direct marketing would fall to be judged differently than general newspaper articles.

1101 Ibid, para 22ff. The applicant made extensive argument that the interference had nonetheless not been 'prescribed by law', an argument which the Court rejected and which is not of particular interest to the present study as it was specific to the technical way in which the ban had been drafted.

1102 Ibid, para 8.

1103 The president's vote deciding, cf Rule 18 (2) of the Rules of Procedure of the European Commission on Human Rights.

1104 *Casado Coca v Spain [Commission]* App no 15450/89 (Commission Decision, 01 December 1992), para 66.

1105 This, incidentally, is the point for which the case has been most frequently cited subsequently.

the rights of others'.[1106] The Court slightly modified this, noting that it '[did] not have any reason to doubt that the Bar rules complained of were designed to protect the interests of the public while ensuring respect for members of the Bar',[1107] before noting that

> [i]n this connection, the special nature of the profession practised by members of the Bar must be considered; in their capacity as officers of the court they benefit from an exclusive right of audience and immunity from legal process in respect of their oral presentation of cases in court, but their conduct must be discreet, honest and dignified. The restrictions on advertising were traditionally justified by reference to these special features.[1108]

While that statement with its balance between rights and duties related specifically to the Spanish Bar at the time, attentive readers will have noticed that the Court, in the modern version of the *Nikula* doctrine, has simply applied the same criteria, claiming that lawyers' conduct must be discreet, honest and dignified, but that lawyers are compensated for this by 'exclusive rights and privileges',[1109] a contention that may not be universally true.[1110] However, aside from the difficulties that simply moving this assessment from the domestic level to the Convention without adjusting for context poses, even in the specific context of *Casado Coca* itself that statement arguably begged the question. Art. 10 § 2 does not contain any of the elements the Court cited. While it seems that the Court took the aim to be 'the protection of the rights of others' in the sense of protecting members of the public, it is not clear what difference the special features cited by the Court make to this aim. Most importantly, the vague reference to the fact that 'restrictions on advertising were traditionally justified by reference to these special features' – which explicitly does not state that the Court itself considers this to be a justification – on its own does not set out a legitimate aim.

1106 *Casado Coca v Spain* (n 1092), para 44.
1107 Ibid, para 46.
1108 Ibid, para 46.
1109 *Morice v France [GC]* (n 1070), para 133.
1110 Notably, the recent cases of *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 75, and *Correia de Matos v Portugal [GC]* (n 1097), para 140, justify the 'duties and restrictions' by reference to the 'special role of lawyers' directly, without reference to any exclusive rights and privileges, although they do cite the older case law containing that latter dictum. However, since the subsequent case of *Tuğluk and others v Turkey (dec)* (n 1096), para 35, continues the traditional line of justification, classing this as a shift in case law would be jumping to conclusions.

Instead, the statement may have been a response to the Government's argument, which 'also pointed out that advertising had always been found to be incompatible with the dignity of the profession, the respect due to fellow members of the Bar and the interests of the public'.[1111] However, the mere fact that it 'had always been found to be incompatible' is hardly an argument, and the justifications raised do not appear directly in Art. 10 § 2. The kindest interpretation of the Court's reaction is perhaps that the Court was trying to explain why stronger restrictions on advertising for lawyers than for other services providers might be legitimate aims under the Convention, but if so, one would have expected the Court to close some of the gaps in the logical chain by reference to eg, the information deficit frequently cited to justify such restrictions. In fact, the Court may have been trying to pave the way for its later assessment of whether the interference was 'necessary in a democratic society'. Similarly, in the subsequent admissibility decision in *Lindner v Germany (dec)*, the Fourth Section cited *Casado Coca* before going on to find that 'the restrictions on advertising by lawyers, as applied in the applicant's case, served this general purpose of ensuring an appropriate professional conduct of lawyers'.[1112]

In its assessment in *Casado Coca* of whether the interference was 'necessary in a democratic society', the Court then went on to apply the doctrine of margin of appreciation, holding that

> [t]he wide range of regulations and the different rates of change in the Council of Europe's member States indicate the complexity of the issue. Because of their direct, continuous contact with their members, the Bar authorities and the country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices.[1113]

'In view of the above', the Court went on, 'the Court holds that at the material time – 1982-83 – the relevant authorities' reaction could not be considered disproportionate to the aim pursued'.[1114] While formally it therefore did not rule on whether a ban at the time of the judgment itself

1111 *Casado Coca v Spain* (n 1092), para 44.
1112 *Lindner v Germany (dec)* (n 1096) 8.
1113 *Casado Coca v Spain* (n 1092), para 55. Much the same quote appears in the subsequent admissibility decision in *Lindner v Germany (dec)* (n 1096) 9.
1114 *Casado Coca v Spain* (n 1092), para 56.

would have violated the Convention, the Court did give a hint[1115] as to what the result might have been by including both a number of subsequent legislative developments in Spain itself[1116] and a reference to a pan-European development:[1117]

> In most of the States parties to the Convention, including Spain, there has for some time been a tendency to relax the rules as a result of the changes in their respective societies and in particular the growing role of the media in them. The Government cited the examples of the Code of Conduct for Lawyers in the European Community (Strasbourg, 28 October 1988)[1118] and the conclusions of the Conference of the European Bars (Cracow, 24 May 1991); while upholding the principle of banning advertising, these documents authorise members of the Bar to express their views to the media, to make themselves known and to take part in public debate.[1119]

While the decision itself thus ultimately hinged on what might have been within the State's margin of appreciation in '1982-83',[1120] the Court did make a broader statement in the run-up to this conclusion which is significant particularly due to its aforementioned impact on subsequent case law:

> The applicant and the Commission argued that commercial undertakings such as insurance companies are not subject to restrictions on advertising their legal consulting services.
>
> In the Court's opinion, however, they cannot be compared to members of the Bar in independent practice, whose special status gives them a central position

1115 Which is largely in keeping with its statement in *Barthold v Germany* (n 1099), para 58 that a total ban on advertising for veterinary surgeons was 'not consonant with freedom of expression [because] [i]ts application risk[ed] discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing to some degree, an advertising effect'.

1116 *Casado Coca v Spain* (n 1092), para 23ff.

1117 *Casado Coca v Spain* (n 1092), para 54. However, even in *Brzank v Germany (dec)* App no 7969/04 (ECtHR, 23 October 2007) 6 and *Heimann v Germany (dec)* App no 2357/05 (ECtHR, 23 October 2007) 6, the Court still held that 'considering the wide range of regulations and the changes occurring in the Council of Europe's Member States, the bar authorities and the domestic courts, because of their direct, continuous contact, are in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved', merely repeating what it had already found in *Casado Coca*.

1118 This is now the CCBE's Code of Conduct for European Lawyers.

1119 *Casado Coca v Spain* (n 1092), para 54. It is worth repeating that the Commission narrowly found a violation, cf ibid (n 1104), para 61ff.

1120 *Casado Coca v Spain* (n 1092), para 56.

> in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils.[1121]

This was the birth of the *Nikula* doctrine, and set the tone for the Court's subsequent jurisprudence. The 'special status' which gives lawyers 'a central position in the administration of justice as intermediaries between the public and the courts' went on to become a core tenet of the Court's jurisprudence, and is mentioned in practically all of the major cases discussed herein, putting it on an equal footing with the *Elçi* dictum which will be discussed below.[1122] If the *Casado Coca* quote arose in the very specific context of explaining why lawyers are different to 'commercial undertakings such as insurance companies',[1123] it has nonetheless been transposed into a wide variety of other contexts without noticeable modification. The phrase that lawyers' 'special status gives them a central position in the administration of justice as intermediaries between the public and the courts' has become ubiquitous and is now used as part of one of the Court's two general text blocks on the significance of lawyers.[1124]

(b) *The* Nikula *dictum as a means of restricting rights*

In keeping with its origin in the context of a case on additional restrictions, this 'special status' has almost exclusively been used to further narrow the rights of lawyers. In *Schöpfer v Switzerland* (1998), the Court built upon the *Casado Coca* dictum by adding that as

> the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence, … [r]egard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein,[1125]

1121 Ibid, paras 53–54 (paragraph numbering omitted).
1122 *Elçi and others v Turkey* (n 1067), para 669, cf 240ff below.
1123 *Casado Coca v Spain* (n 1092), para 53.
1124 cf the references in n 1096 and n 1097.
1125 *Schöpfer v Switzerland* (n 1096), para 29. The case is discussed in detail in Chapter Three, 171ff.

and that therefore freedom of expression for lawyers could be restricted to a greater extent than that of persons without a 'special status'. Citing *Schöpfer*, the Third Section in *Mattei v France (dec)* (2001) noted that

> [l]a Cour rappelle à cet égard le statut spécifique des avocats placés dans une situation centrale dans l'administration de la justice … Elle considère que cette situation a pu légitimement entraîner des limitations aux libertés de parole et de réunion de la requérante, mise en examen pour tentative d'extorsion de fond dans un contexte terroriste et considère, dès lors, que les mesures prises dans le cadre du contrôle judiciaire étaient justifiées par les faits reprochés à l'intéressée et les circonstances dans lesquelles ces faits avaient été commis.[1126]

This quote is noteworthy because it jumps straight from the 'special status' to additional restrictions, without even mentioning that such a 'special status' could also be interpreted to provide additional rights – particularly since the applicant in *Mattei* complained that due to a prohibition on leaving Paris she had been unable to continue representing her clients in Corsica,[1127] explicitly making a link to her role in securing their defence rights.[1128] Similar rationales moving from special status to additional restriction also appear in other cases,[1129] including many of the cases on freedom of expression outside the courtroom.[1130]

While the wording of a 'special status' is neutral enough, it seems, then, that in reality its main thrust is 'less protection'. This is, inter alia, apparent from the Court's wording in *Reznik v Russia*.[1131] In *Reznik*, the Court noted that

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1126 *Mattei v France (dec)* (n 1098) 14 (reference to *Schöpfer* omitted). 'The Court recalls in this respect the special status of lawyers, who occupy a central position in the administration of justice. It considers that this situation may legitimately have led to restrictions on the applicant's freedom of speech and assembly, since she was under investigation for attempted extortion in a terrorist context, and therefore considers that the measures taken in the context of judicial supervision were justified by the facts with which she was charged and the circumstances in which those facts were committed.' (author's translation)

1127 Ibid 3.

1128 Ibid 7. As discussed in Chapter Three at 181, the Court rejected this submission, arguing that the applicant – unlike her clients – was neither 'charged with a criminal offence' within the meaning of Art. 6 § 3 nor a 'victim' in the sense required by Art. 34 ECHR.

1129 eg *Lindner v Germany (dec)* (n 1096) 9 or *Tuğluk and others v Turkey (dec)* (n 1096), para 35.

1130 See Chapter Three, 170ff.

1131 The case is discussed in greater detail in Chapter Four, 211ff.

> [t]he applicant is a professional lawyer and the President of the Moscow Bar. Admittedly, the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts, and such a position explains the usual restrictions on the conduct of members of the Bar. However, as the Court has repeatedly emphasised, lawyers are entitled to freedom of expression too and they have the right to comment in public on the administration of justice provided that their criticism does not overstep certain bounds.[1132]

This juxtaposition of the 'special status' with lawyers' freedom of expression shows particularly clearly that in general, the 'special status' restricts rights instead of expanding them, something that is questionable when compared to other statements in the Court's jurisprudence such as the *Elçi* dictum. Nonetheless, using the 'special status' to restrict lawyers' rights appears as the overall trend from the case law, with *Peruzzi v Italy* (2015)[1133] perhaps serving as a particularly vivid example. In that case, the Court highlighted that

> [a] particular aspect of the present case is that, at the material time, the applicant was a lawyer and his dispute with X had arisen in the context of his professional activity. In its *Nikula* judgment … the Court summarised as follows the specific principles applicable to the legal professions',[1134]

before going on to cite only the paragraph in *Nikula* which set out additional restrictions on freedom of expression by lawyers. Noticeably, the judgment focused heavily on additional restrictions, but did not mention that lawyers' freedom of expression can also serve public interest reasons,[1135] setting the stage well for the finding that the applicant's defamation conviction for statements relating inter alia to general problems in the Italian justice system had not been a violation of the Convention.[1136]

1132 *Reznik v Russia* (n 1096), para 44.

1133 *Peruzzi v Italy* (n 1096).

1134 Ibid, para 50.

1135 cf Chapter Four, 208.

1136 Arguably, the Joint Dissenting Opinion of Judges Wojtyczek and Grozev is rather more convincing than the majority opinion, particularly since it does indeed seem questionable whether an angry letter by a lawyer to a judge's colleagues will really have 'a real impact on the image of the judge concerned among that judge's colleagues', cf *Peruzzi v Italy* (n 1096) 19. In particular, the majority's reasoning in this respect is in tension with *Mikhaylova v Ukraine* App no 10644/08 (ECtHR, 06 March 2018), para 93, where the Court, noting that only court staff had heard the impugned statements, argued that 'all those present were, by virtue of their position and training, unlikely to have been susceptible to the applicant's sweeping and emotional criticism of the judge'.

This tendency for the 'special status' to be used primarily to restrict lawyers' rights may also parallel the use of similar doctrines at the domestic level. For example, in *Namazov v Azerbaijan*, where the Court found that disbarment of a lawyer with extensive activities related to the political opposition had violated Art. 8 ECHR, the Government, seeking to defend the disbarment, 'stressed the key role played by the lawyers in the administration of justice'[1137] and argued that this justified sanctioning the applicant for his sharp language.[1138] Once again, similar considerations appear in a number of freedom of expression cases.[1139]

These cases show the potential for the 'special status' doctrine to be used to restrict lawyers' rights. While the Court has at times also relied on lawyers' semi-public status to strengthen their position, in these cases, it has done so without including the *Nikula* dictum. A notable example is *Campbell v UK* (1992). In that case, when the Government argued 'that the professional competence and integrity of solicitors could not always be relied on [and] added that they not infrequently broke their disciplinary rules',[1140] the Court responded that

> [i]t must also be borne in mind that solicitors in Scotland are officers of the court and are subject to disciplinary sanctions by the Law Society of Scotland for professional misconduct [and that] [i]t has not been suggested that there was any reason to suspect that the applicant's solicitor was not complying with the rules of his profession.[1141]

Similarly, in *Khodorkovskiy and Lebedev v Russia* (2013) the Court drew on lawyers' position to elevate their protection, noting that

> [t]o have a reasonable cause for interfering with the confidentiality of lawyer-client written communications the authorities must have something more than a sweeping presumption that lawyers always conspire with their clients in disregard of the rules of professional ethics and despite the serious sanctions which such behaviour entails,[1142]

1137 *Namazov v Azerbaijan* (n 1058), para 39.
1138 For a similar argument by the French government see *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991), para 49.
1139 eg *Morice v France [GC]* (n 1070), para 41.
1140 *Campbell v UK* App no 13590/88 (ECtHR, 25 March 1992), para 51.
1141 Ibid, para 52.
1142 *Khodorkovskiy and Lebedev v Russia* App no 11082/06; 13772/05 (ECtHR, 25 July 2013), para 640.

and in *Forum Maritime SA v Romania* (2007) the Court highlighted in its reasoning regarding access to certain documents that the applicant's lawyer would have been bound by professional secrecy obligations in any case.[1143]

In essence, these cases show the flipside of the disciplinary law provisions which will be discussed below:[1144] Giving lawyers additional rights in specific situations, in these cases, was justified by reference to the fact that they are also subject to elevated standards of behaviour, in keeping with the idea, if not the wording, of *Nikula*. However, it is worth stressing that the Court does not typically refer to the 'special status' jurisprudence in this context, and eg the reference to 'specific status' to reinforce the position of lawyers in the joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque in *Ibrahim and others v UK [GC]* (2016) failed to convince the Grand Chamber's majority.[1145] Similarly, in a case that did not concern 'additional' rights, but merely the general right to assembly and association under Art. 11 ECHR, the Court made no reference to a specific status and simply held that

> freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion.[1146]

Once again, the reference to 'avocat' seems to have been entirely in terms of that status in principle legitimising additional restrictions on rights.

As a final point, it is worth noting that despite the rhetorical emphasis in the French version on 'avocats',[1147] a term rather narrower and more status-based than 'lawyers', these principles are also likely to apply – perhaps in modified form – to others providing similar services. While the only case so far to indicate this directly is a 2003 admissibility decision, the Third Section in that case decided that the aforementioned

> principles likewise apply to the applicant. As a tax consultant he represented his clients before the tax offices and tax courts and in this way acted as an intermediary between the public and the tax authorities just as an attorney does in the general judicial system. He was accordingly subject to monitoring and

1143 *Forum Maritime SA v Romania* App no 63610/00; 38692/05 (ECtHR, 04 October 2007), para 136.

1144 275ff.

1145 *Ibrahim and others v UK [GC]* App no 50541/08 and others (ECtHR, 13 September 2016) 104.

1146 *Ezelin v France* (n 1138), para 53.

1147 cf n 1098.

> supervisory powers vested in tax consultant chambers that are comparable to those of bar councils. In this way he assumed a role comparable to that of a lawyer.[1148]

While that reasoning seems to attach quite strongly to Bar membership, that the Court does not require this for its 'special status' doctrine seems clear: *Nikula* itself concerned an applicant who was not a member of the Bar.[1149] Most recently, in the judgment of *Mikhaylova v Ukraine* (2018),[1150] which concerned statements in court by a legal representative who was not a lawyer under domestic law,[1151] the Court made no direct statement on the issue. Instead, it simply referred to a number of cases concerning both freedom of expression for lawyers in the courtroom and for witnesses,[1152] but did not clarify whether it saw the applicant as subject to any kind of special status. That side-stepped the question, and as such there is no certainty as to who exactly will be subject to the 'special status' to which the Court has referred.[1153]

The exigencies of legal services, particularly the fact that independence is a quality requirement and the way lawyers as private individuals facilitate access to the State justice system, therefore lead to an ambiguous position for lawyers, somewhere between State and non-State. The Court has referred to this as a 'special status', which generally justifies additional restrictions on their rights. While this *Nikula* doctrine therefore tends to decrease the protection which legal services will enjoy by allowing for greater restrictions on lawyers, there is also another dictum on the position of lawyers: the *Elçi* dictum, which is discussed in the next section.

2. 'The very heart of the Convention system'[1154]

'The special status of lawyers [which] gives them a central position in the administration of justice as intermediaries between the public and the

1148 *Böhm v Germany (dec)* (n 1096) 5.
1149 *Nikula v Finland* (n 1061), para 53.
1150 *Mikhaylova v Ukraine* (n 1136).
1151 Ibid, para 95.
1152 Ibid, para 83ff.
1153 One plausible analysis might also be that the Court is trying to move away from a line of reasoning that hinges so heavily on 'status', although given the established nature of the *Nikula* dictum it is too early to tell in this respect.
1154 *Elçi and others v Turkey* (n 1067), para 669.

courts'[1155] has then been shown to be used primarily to justify additional restrictions on the rights of lawyers, rather than to protect their position. If the individually-worded *Nikula* dictum tends to reduce rights, the opposite appears to be true for the public-interest *Elçi* dictum.

Due to its significance to the Court's case law, this quote is worth reprising. In its original, taken from a 2003 judgment concerning alleged harassment of lawyers for their human rights work,[1156] it reads as follows:

> The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.[1157]

The dictum has been used in modified variants in a total of ten further judgments,[1158] with the most recent reasoned case being *Namazli v Azerbaijan* (2024).[1159] Typically, it has been reduced to a modified version of its third and fourth sentence, and is usually given as '[t]he Court has repeatedly held that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system',[1160] followed

1155 *Nikula v Finland* (n 1061), para 45.

1156 *Elçi and others v Turkey* (n 1067), para 3.

1157 Ibid, para 669. There does not appear to be a French-language version of the *Elçi* dictum, since all of the cases using it were decided in English.

1158 *Aleksanyan v Russia* App no 46468/06 (ECtHR, 22 December 2008), para 214; *Kolesnichenko v Russia* App no 19856/04 (ECtHR, 09 April 2009), para 31; *Heino v Finland* App no 56720/09 (ECtHR, 15 February 2011), para 43; *Golovan v Ukraine* (n 1056), para 62; *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; *Yuditskaya and others v Russia* App no 5678/08 (ECtHR, 12 February 2015), para 27; *Annagi Hajibeyli v Azerbaijan* App no 2204/11 (ECtHR, 22 October 2015), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* App no 11264/04 and others (ECtHR, 04 February 2020) (n 1077), para 125; *Namazli v Azerbaijan* (n 1077), para 35. Reference to *Elçi* has been made in more than just these cases; these are simply the ones which contain the *Elçi* dictum verbatim, suggesting that it was particularly important to the Court's reasoning.

1159 *Namazli v Azerbaijan* (n 1077), para 35.

1160 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; *Yuditskaya and others v*

by a reference to 'especially strict scrutiny' for the area under consideration (frequently 'searching of lawyers' premises').[1161]

These cases all share two notable features. First, with the exception of *Heino v Finland* (2011), they all concern States which in the past have been plausibly accused of harassment of human rights defenders,[1162] or where – as in *Aliyev v Azerbaijan* (2018) – the Court itself noted that '[its own] judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law'.[1163] Second, in all of these cases the Court found violations of the Convention provision under scrutiny.[1164] These factors set the *Elçi* dictum apart significantly from that in *Nikula*, which has appeared in a wide variety of contexts, as regards a number of countries and in judgments both finding violations and those finding no violation.

(a) Elçi and others v Turkey

In *Elçi* itself, the 16 applicants,

> who [were] all Turkish lawyers, alleged that in November and December 1993 they were taken into detention by law enforcement officers on the pretext of involvement in criminal activities, but in reality because they had represented

Russia (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* (n 1158), para 125; *Agora and others v Russia* App no 28539/10 and others (ECtHR, 13 October 2022), para 8.

1161 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Yuditskaya and others v Russia* (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* (n 1158), para 125.

1162 Of the remaining ten cases, one concerns Turkey (*Elçi* itself), six concern the Russian Federation, two concern Azerbaijan and one concerns Ukraine.

1163 *Aliyev v Azerbaijan* (n 1070), para 223.

1164 Art. 5 § 1: *Elçi and others v Turkey* (n 1067), para 685; Art. 6 § 3 (c): *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; Art: 8: *Aleksanyan v Russia* (n 1158), para 218; *Kolesnichenko v Russia* (n 1158), para 36; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056); *Yuditskaya and others v Russia* (n 1158), para 32; *Aliyev v Azerbaijan* (n 1070), para 189; *Kruglov and others v Russia* (n 1158), para 138; *Agora and others v Russia* (n 1160), para 12; *Namazli v Azerbaijan* (n 1077), para 54; Art. 34: *Annagi Hajibeyli v Azerbaijan* (n 1158), para 79.

> clients before the State Security Court and been involved in human rights work.[1165]

The applicants also complained of maltreatment, arbitrary searches and seizures and hindrance of their right to make complaints to the Convention organs.[1166] The case raised, in particular, the principle of non-identification of lawyer and client,[1167] with one of the applicants having been 'accused of being the PKK's lawyer',[1168] to which he 'insisted that he had no relations with the PKK other than in his authorised professional capacity as a defence lawyer',[1169] and another being 'accused of assisting PKK detainees by … not charging fees for his work'.[1170]

After having found a violation of Art. 3 in both its procedural and substantive limbs,[1171] the Court turned its attention to Art. 5 § 1, highlighting that article's purpose of protecting individuals from arbitrariness.[1172] It then expounded the text block cited above, underlining the role of the legal profession, followed by a summary of the three-week period in 1993 during which the various applicants had been rounded up and arrested, essentially on the strength of incriminating statements made by a former PKK member turned crown witness. After an extensive critique of domestic law, the Court found that it

> ha[d] not been sufficiently shown that the applicants' apprehension and their detention by the gendarmerie … was duly authorised by a Prosecutor in accordance with the requirements of domestic law or 'in accordance with a procedure prescribed by law' within the meaning of Article 5 § 1 of the Convention,[1173]

1165 *Elçi and others v Turkey* (n 1067), para 3.
1166 Ibid, para 3.
1167 Well put in the UN Basic Principles on the Role of Lawyers at para 18: 'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.' The UN Basic Principles are discussed in Chapter One, 34ff.
1168 *Elçi and others v Turkey* (n 1067), para 29.
1169 Ibid, para 29.
1170 Ibid, para 66, 243. For similar reference to a potential violation of the principle of non-identification see *Kruglov and others v Russia* (n 1158), para 121, where '[i]n twelve applications the applicants' only connection to the criminal cases had been the fact that they had provided legal services to an individual or a legal person involved in those criminal proceedings'.
1171 *Elçi and others v Turkey* (n 1067), para 649.
1172 Ibid, para 667.
1173 Ibid, para 682.

finding a violation of Art. 5 § 1 'in respect of all the applicants'.[1174] The Court also went on to find a violation of Art. 8 regarding the searches.[1175]

The Court then turned to former Art. 25 (now Art. 34),[1176] the right to individual petition, and referred back to its general dictum on 'the central role of the legal profession' in a paragraph in which, '[m]ore generally, the Court expresse[d] its concern as to the inevitable chilling effect that this case must have had on all persons involved in criminal defence work or human rights protection in Turkey'.[1177] Nonetheless, it noted that '[h]owever, the Court must limit its conclusion to the facts of the present applications'.[1178] Based upon this, 'the Court [did] not find, on balance, that there ha[d] been a significant hindrance in the applicant's right of individual petition in breach of (former) Article 25 of the Convention'.[1179]

(b) Elçi *as protecting the legal profession*

Elçi is noticeable because it seems to be the first case in which the Court had to deal with measures against a larger group of lawyers, who alleged that they had been specifically targeted for reprisal as a result of exercising their professional functions. The applicants in that case alleged a systematic campaign of harassment of lawyers taking on sensitive cases, particularly those related to the PKK, referring in their application 'to the unresolved murder of 6 lawyers between 1993 and 1995, as well as the criminal prosecution of 48 lawyers practising in defence work'.[1180] The case was therefore not just one of interference with these lawyers specifically, as individuals; instead, the selection of the lawyers who had been arrested suggested that one goal of the impugned measures was to intimidate any lawyer from taking the relevant cases, in line with the 'chilling effect … on all persons

1174 Ibid, para 685.
1175 Ibid, para 669.
1176 Ibid, para 701.
1177 Ibid, para 714. The Court's use of the term 'chilling effect' to denote that a certain minimum activity level is desirable is discussed in Chapter Six, 335ff.
1178 Ibid, para 714. Note that in more recent case law, cf eg *Aliyev v Azerbaijan* (n 1070), para 223, the Court has been much more comfortable including the general context of a case in its reasoning.
1179 *Elçi and others v Turkey* (n 1067), para 715.
1180 Ibid, para 656.

involved in criminal defence work or human rights protection in Turkey'[1181] that the Court identified. In *Elçi* itself, it seems clear that the Court's aim was not just to protect the individuals concerned – who, after all, had not been targeted for any reason specific to their persons, but for their work as criminal defence attorneys, that is, for their *role* –, but to lay down a firm position prohibiting interference with the legal profession as a whole.

This public-interest context to the *Elçi* dictum fits well with a certain trend. The fact that the Court makes reference to the *Elçi* dictum with its greater emphasis on the public-interest 'role of the legal profession',[1182] rather than on the 'special status of lawyers'[1183] as individuals from the *Nikula* dictum, only in those cases where it then finds a violation tends to suggest that protection against systemic issues will be particularly elevated. Interference with the position of individual lawyers in isolated cases does not seem to attract use of the 'especially strict scrutiny' the *Elçi* dictum comports. However, where the Court is faced with credible allegations of 'persecution or harassment of members of the legal profession', seriously deficient domestic laws[1184] or even itself observes that its own case law 'reflect[s] a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law',[1185] the Court's 'especially strict scrutiny' will lead to a finding that the Convention has been violated.

That would tend to indicate that where the Court is of the opinion that problematic cases related to legal services are not limited to isolated incidents, but reflect more widespread problems with the role of legal services, this will be an attack on a pillar of the rule of law which will always lead to a finding of a Convention violation. In turn, that suggests that the legal profession as a whole – in the sense of the totality of lawyers available to take certain cases – will enjoy an elevated level of Convention

1181 Ibid, para 714. Note that similar problems continue, cf the open letter by a delegation of 27 bar associations published in November 2023, Law Society, 'Widespread mistreatment of lawyers in Turkey' (2023) <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/Widespread%20mistreatment%20of%20lawyers%20in%20Turkey> accessed 08 August 2024.

1182 *Elçi and others v Turkey* (n 1067), para 669.

1183 *Nikula v Finland* (n 1061), para 45

1184 cf *Heino v Finland* (n 1158); *Golovan v Ukraine* (n 1056); *Kruglov and others v Russia* (n 1158).

1185 *Aliyev v Azerbaijan* (n 1070), para 223.

protection over and above that discussed above which individual lawyers will enjoy.[1186] While the framing of these cases remains within the individual, subjective-rights-oriented classical logic of the Convention regime,[1187] it seems possible that the applicants in these cases are benefitting from a different norm: the norm that the legal services sector in the sense of the totality of persons providing legal services is particularly protected under the Convention as part of 'the very heart of the Convention system'.[1188] While isolated cases regarding interference with the provision of legal services will be largely treated on their own merits, where the Court has the impression that a State is no longer complying properly with its obligation to ensure the availability of legal services this will be a Convention violation.

Moreover, this analysis would also explain the difference in wording between the *Nikula* and *Elçi* dicta. In this regard, it is noticeable that the *Nikula* line of cases place their emphasis squarely on the lawyer as an individual with a certain position. Conversely, the *Elçi* dictum takes 'the legal profession' as its point of departure, and indeed the sentence on 'the freedom of lawyers', which uses more individual wording, has been omitted in all but one of the subsequent references to *Elçi*.[1189] Even in the context of protection against 'persecution or harassment', the recipients of this additional protection are defined by reference to their role or group membership, the fact that they are 'members of the legal profession'. One possible analysis of this language is that it implies a sort of derivative status, where the *Elçi* dictum offers protection not so much in the recipients' own right, but as a result of their belonging to the group of lawyers.[1190]

1186 Note, for example, that even *Cazan v Romania* (n 1073) (discussed in Chapter Three, 183ff), in which the Court found a violation of a lawyer's Art. 3 rights, did not contain any reference to more general structural issues concerning harassment of lawyers in Romania.

1187 On this see Chapter Seven, 355ff.

1188 A point once again illustrated by *Aliyev v Azerbaijan* (n 1070), para 223, since otherwise it is unclear why the Court would attach significance to cases other than the one at hand. A similar alternative analysis of these cases is proposed in Chapter Nine.

1189 *Namazli v Azerbaijan* (n 1077), para 35. Omitted in *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Khodorkovskiy and Lebedev v Russia* (n 1142), para 632; *Yuditskaya and others v Russia* (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; *Aliyev v Azerbaijan* (n 1070), para 181; *Kruglov and others v Russia* (n 1158), para 125.

1190 On the difficulties of reconciling role-based protection with traditional conceptions of human rights see Chapter Eight, 423ff.

Simultaneously, that sits well with the main thrust of the Court's argument: Individual lawyers are being protected because 'the legal profession' as a whole is essential to maintaining the rule of law, even if there is a certain amount of fungibility at the level of the individual lawyer. One possible analysis, then, is that what the Court is actually trying to protect is the legal profession as a whole, and that the protection of individual lawyers is a part of this rather than a goal in its own right.

The comparatively recent case of *Annagi Hajibeyli v Azerbaijan* (2015)[1191] provides a particularly clear example of this wider public-interest dimension to the *Elçi* dictum. In that case, when dealing with the Government's (unsuccessful) application to have the case struck out on the basis of a unilateral declaration, the Court drew on *Rantsev v Cyprus and Russia* (2010)[1192] and explicitly clarified its own 'constitutional' role, albeit in relation to a complaint under Art. 3 of Protocol 1:

> Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States …[1193]

The Court then went on to note that, as regards parliamentary elections, the 'relatively numerous complaints brought before the Court … appea[r] to disclose an existence of systematic or structural issues which call for adequate general measures to be taken by the authorities',[1194] and ultimately went on to find a violation on this point.[1195] It then turned to the applicant's complaint that the case file relating to the application before the Court had been seized by the domestic authorities during a search of his representative's professional premises,[1196] where the applicant argued that

1191 *Annagi Hajibeyli v Azerbaijan* (n 1158).
1192 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 07 January 2010), para 197.
1193 *Annagi Hajibeyli v Azerbaijan* (n 1158), para 36. Note the contrast to *Elçi and others v Turkey* (n 1067), para 714, '[h]owever, the Court must limit its conclusion to the facts of the present applications'.
1194 *Annagi Hajibeyli v Azerbaijan* (n 1158), para 38.
1195 Ibid, para 55.
1196 Ibid, para 56.

his representative's arrest was '"part of the (recent) serious crackdown on civil society in Azerbaijan, including the lawyers and human rights (activists)"'.[1197] In its examination of that point, the Court then referred to the *Elçi* dictum.[1198] Although, as discussed in Chapter Three,[1199] it explicitly

> [left] unaddressed the applicant's argument in the present case that the institution of criminal proceedings against [his representative] was an act of intentional interference with his legal representation of a number of applicants before the Court and part of a crackdown campaign against human-rights lawyers and activists,[1200]

the Court did 'tak[e] the view that lack of access to the applicant's case file must have had a "chilling effect" on the exercise of the right of individual petition by the applicant and his representative, and that it cannot realistically be argued otherwise'.[1201] While the Court therefore did not explicitly comment on the potential existence of a structural issue, the pains it took to emphasise that it was *not* speaking about such a structural issue themselves leaves little doubt about its position.

(c) Aliyev v Azerbaijan *and the public interest in legal services*

While the Court in *Annagi Hajibeyli* was still able to ostensibly sidestep the issue of systemic problems, the later case of *Aliyev v Azerbaijan* (2018), brought by the representative in the *Annagi Hajibeyli* case, raised the problem directly. *Aliyev v Azerbaijan* concerned a variety of investigative measures (including a search of his home and office and, ultimately, his detention) against 'a well-known human-rights lawyer and civil-society activist'.[1202] At the time in question, the applicant 'represent[ed] applicants before the Court in a large number of pending cases'[1203] and was also the chairman of an NGO with the functions of 'raising legal awareness,

1197 Ibid, para 59.
1198 Ibid, para 68.
1199 cf Chapter Three, 194.
1200 *Annagi Hajibeyli v Azerbaijan* (n 1158), para 70.
1201 Ibid, para 77.
1202 *Aliyev v Azerbaijan* (n 1070), para 7.
1203 Ibid, para 7. For example, he was also the representative (as well as one of the applicants) in *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), cf ibid para 2, and represented the applicants in *Annagi Hajibeyli v Azerbaijan* (n 1158), para 2, and *Fatullayev v Azerbaijan (No 2)* App no 32734/11 (ECtHR, 07 April 2022), para 2.

organisation of training programmes for lawyers, human-rights defenders and journalists and preparation of reports relating to various human-rights issues in Azerbaijan'.[1204] The Court, after finding a violation of Art. 8 regarding the search, also found a violation of Art. 18 taken in conjunction with Art. 8 because the measures directed against the applicant had been applied for a purpose other than those listed in Art. 8 § 2.

As part of its assessment under Art. 18 in conjunction with Art. 8, the Court was keen to highlight 'the applicant's status'.[1205] In particular, it noted that

> it is not disputed between the parties that the applicant is a human-rights defender and, more specifically, a human-rights lawyer … In line with the international materials cited above … the Court attaches particular importance to the special role of human-rights defenders in promoting and defending human rights, including in close cooperation with the Council of Europe, and their contribution to the protection of human rights in the member States. The Court also takes note of the fact that the applicant is the legal representative before the Court in a large number of cases and has submitted on behalf of the Association communications to the Committee of Ministers concerning the execution of the Court's judgments.[1206]

It then noted that

> the applicant's situation cannot be viewed in isolation. Several notable human-rights activists who have cooperated with international organisations for the protection of human rights, including, most notably, the Council of Europe, have been similarly arrested and charged with serious criminal offences entailing heavy prison sentences. These facts support the applicant's and the third parties' argument that the measures taken against him were part of a larger campaign to 'crack down on human-rights defenders in Azerbaijan, which had intensified over the summer of 2014'.[1207]

The Court then drew on the aforementioned to establish a violation of Art. 18.

> The totality of the above circumstances – specifically, the applicant's status as a lawyer representing applicants before the Convention institutions, the nature and substance of the charges brought against him, the statements made by

1204 *Aliyev v Azerbaijan* (n 1070), para 8.
1205 Ibid, para 208.
1206 Ibid, para 208.
1207 Ibid, para 214, with reference to *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016), para 161. Again, note the contrast to *Elçi and others v Turkey* (n 1067), para 714, '[h]owever, the Court must limit its conclusion to the facts of the present applications'.

> public officials, the arbitrary manner in which the search and seizure took place, the general context of the legislative regulation of NGO activity, the repercussions on the applicant's right to freedom of association and the general situation concerning human-rights activists in the country – indicates that the authorities' actions were driven by improper reasons and the actual purpose of the impugned measures was to silence and to punish the applicant for his activities in the area of human rights as well as to prevent him from continuing those activities.[1208]

In *Aliyev*, the Court clearly stated the view that the problems at stake were not individual, but systemic. Indeed, the Court even took the opportunity to include a separate section on Art. 46 of the Convention to clarify 'the type of individual and/or general measures that might be taken in order to put an end to the situation [the Court] has found to exist'.[1209] After finding that

> the measures taken against the applicant, in particular his arrest and pre-trial detention were aimed at silencing and punishing him for his activities in the area of human rights as well as at preventing him from continuing his work as a human-rights defender in breach of Article 18 of the Convention,[1210]

the Court noted that it had found similar violations in a number of other cases concerning Azerbaijan,[1211] where it had likewise

> concluded that the actual purpose of the arrest and pre-trial detention was either to silence and punish the applicants for criticising the Government or for their active social and political engagement … or to silence and punish the applicants for their activities in the area of human rights or in the area of electoral monitoring.[1212]

Having highlighted this, the Court went on to directly find the existence of a systemic problem:

> The Court notes with concern that the events under examination in all five of [the aforementioned] cases cannot be considered as isolated incidents. The reasons for the above violations found are similar and inter-connected. In fact, these judgments reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law.[1213]

1208 *Aliyev v Azerbaijan* (n 1070), para 215.
1209 Ibid, para 222.
1210 Ibid, para 223.
1211 Ibid, para 223.
1212 Ibid, para 223 (citations omitted).
1213 Ibid, para 223.

Moreover, the Court underpinned this finding by reference to external sources, noting that

> [t]his pattern of the use of arbitrary detention in retaliation for the exercise of the fundamental rights to freedom of expression and association has also been the subject of comment by the Council of Europe Commissioner for Human Rights … and other international human-rights organisations.[1214]

It then found that

> the domestic courts, being the ultimate guardians of the rule of law, systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention in the cases which resulted in the judgments adopted by the Court, limiting their role to one of mere automatic endorsement of the prosecution's applications to detain the applicants without any genuine judicial oversight.[1215]

Clearly finding that even these direct words were not enough, the Court then

> [found] it necessary to restate that as the Convention is a constitutional instrument of European public order, the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle.[1216]

While highlighting that the issue of supervising the execution of judgments fell primarily to the Committee of Ministers,[1217] the Court then

> consider[ed] that having regard to the specific group of individuals affected by the above-mentioned pattern in breach of Article 18, the necessary general measures to be taken by the respondent State must focus, as a matter of priority, on the protection of critics of the government, civil society activists and human-rights defenders against arbitrary arrest and detention.[1218]

1214 Ibid, para 223, with reference to the Concluding observations on the fourth periodic report of Azerbaijan adopted by the United Nations Human Rights Committee (ibid, para 79) and the Report of the Special Rapporteur on the situation of human rights defenders on his mission to Azerbaijan (ibid, para 80).

1215 Ibid, para 224.

1216 Ibid, para 225.

1217 Ibid, para 226.

1218 Ibid, para 226. Compare and contrast *Bljakaj and others v Croatia* App no 74448/12 (ECtHR, 18 September 2014), discussed in Chapter Three, 188ff.

(d) Elçi *in the Court's case law*

Although in the passage on Art. 46 in *Aliyev* the Court no longer made reference specifically to lawyers, all of the above focuses heavily on systemic issues in the protection of human rights defenders. It is noticeable that, for this systemic problem, the Court drew on *Elçi* and not *Nikula* – even though there was surely an argument to be made that 'the special status of lawyers' and their 'central position in the administration of justice as intermediaries between the public and the courts',[1219] their 'special role … as independent professionals'[1220] was being interfered with.[1221] Indeed, one might even have expected this, given that the Court explicitly referred to 'the applicant's status'[1222] several times, 'not[ing] that it is not disputed between the parties that the applicant is a human-rights defender and, more specifically, a human-rights lawyer'.[1223] However, no reference to *Nikula* appears in *Aliyev* – and indeed it seems that where public-interest questions are at stake, *Elçi* will be used exclusively. None of the cases in which the *Elçi* dictum appears make any sort of reference to a 'special status' in the *Nikula* sense; instead, cases appear to be classed as either falling into the *Nikula* line of cases of matters concerning individual lawyers, or into the *Elçi* line of cases of matters affecting the legal profession more generally, with corresponding variations in the level of protection the Convention affords.

Moreover, the risk of a 'chilling effect'[1224] on the provision of legal services, including for politically sensitive cases, seems to be a common denominator of the cases using the *Elçi* dictum. For example, *Aleksanyan v Russia* (2008) concerned the former head of *Yukos*' legal department, who had later represented Mikhail Khodorkovskiy and Platon Lebedev in the criminal proceedings against them.[1225] The case, therefore, had particular

1219 *Nikula v Finland* (n 1061), para 45.
1220 *Namazov v Azerbaijan* (n 1058), para 46.
1221 Indeed, in her Explanatory Memorandum to the Draft Recommendation on a European Convention on the Profession of Lawyer, Rapporteur Lahaye-Battheu cites the *Nikula* dictum in this protective, public-interest sense, Sabien Lahaye-Battheu, *The case for drafting a European convention on the profession of lawyer, PACE Doc. 14453 Report* (2017), para 6.
1222 *Aliyev v Azerbaijan* (n 1070), para 208, 215.
1223 Ibid, para 208.
1224 On this term see Chapter Six, 335ff.
1225 *Aleksanyan v Russia* (n 1158), para 7, with the Court explicitly highlighting representation 'in criminal proceedings which are now the subject of complaints before

political sensitivity, and the applicant even alleged a violation of Art. 18.[1226] The Court first found inhuman and degrading treatment contrary to Art. 3 due to the domestic authorities' arbitrary refusal to allow the applicant medical treatment for an advanced case of AIDS.[1227] It then turned its attention to a search of the applicant's premises, where the Court highlighted the *Elçi* dictum and noted that 'the search warrants at issue were formulated in excessively broad terms',[1228] which

> gave the authorities unfettered discretion in deciding what documents to seize, and did not contain any reservation in respect of privileged documents, although the authorities knew that the applicant was a Bar Member and could have possessed documents conferred to him by his clients.[1229]

The Court therefore found a violation of Art. 8 of the Convention,[1230] as well as later finding that 'by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, the Russian Government failed to honour its commitments under Article 34 of the Convention'.[1231] The case, therefore, highlighted what the Court saw as a particularly problematic stance on the part of the Government concerned. Similarly, in *Kolesnichenko v Russia* (2009) the Court also used the *Elçi* dictum in respect of investigative measures against a defence attorney which did not seem to further the investigation in any way, but instead seemed to be a blanket collection of any materials the applicant might have been using for his activities as a lawyer.[1232] In *Heino v Finland* (2011), the Court used the *Elçi* dictum to justify why the quality of the law governing searches of attorneys' offices was particularly important,[1233] underlining a point it had made two years earlier in the *Sorvisto v Finland* (2009) judgment, but without the *Elçi* dictum.[1234] The Court therefore found that since Finnish

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the Court', referring to *Khodorkovskiy v Russia (No 1)* App no 5829/04 (ECtHR, 31 May 2011), *Lebedev v Russia* App no 4493/04 (ECtHR, 25 October 2007) and *Khodorkovskiy and Lebedev v Russia* (n 1142). The latter also makes use of the *Elçi* dictum at para 632.

1226 *Aleksanyan v Russia* (n 1158), para 174, which the Court did not find it necessary to examine separately, cf ibid, para 220.

1227 Ibid, para 155, 158.

1228 Ibid, para 216.

1229 Ibid, para 216.

1230 Ibid, para 218.

1231 Ibid, para 232.

1232 *Kolesnichenko v Russia* (n 1158), para 27, 31-34.

1233 *Heino v Finland* (n 1158), para 43.

1234 *Sorvisto v Finland* App no 19348/04 (ECtHR, 13 January 2009), para 118.

law did 'not provide sufficient judicial safeguards either before the granting of a search warrant or after the search',[1235] it did not satisfy the minimum requirements to be 'in accordance with the law' for the purposes of Art. 8 § 2 of the Convention, a finding which the Court also made in relation to Ukrainian law in *Golovan v Ukraine* (2012).[1236] In keeping with this tendency to use *Elçi* in cases revealing wider, systemic deficits, *Kruglov and others v Russia* (2020) hinged on the problematic finding that 'Russian law at the material time did not provide for procedural safeguards to prevent interference with professional secrecy' in the course of criminal investigations,[1237] in addition to containing allusions to improper use of investigative measures since data-storage devices essential to the applicants' ability to provide legal services had been seized and retained for long periods 'for unexplained reasons'.[1238] What the cases using *Elçi* share, therefore, is a particular importance to public interests in the sense of concerning issues likely to affect the ability of the legal services sector generally to fulfil its constitutional functions, which at times has also been reflected in third-party interventions.[1239]

Although use of the *Elçi* dictum to criticise general problems is therefore generally consistent in the later cases, there is one significant difference between the original *Elçi* dictum and its subsequent use. While the original *Elçi* dictum focused on 'especially strict scrutiny by the Court',[1240] most of the later cases make reference to the fact that because 'persecution and harassment of members of the legal profession strikes at the very heart of the Convention system', 'the searching of lawyers' premises should be sub-

1235 *Heino v Finland* (n 1158), para 46.

1236 *Golovan v Ukraine* (n 1056), para 65, discussed, as regards professional secrecy, in Chapter Two at 100. A similar finding for Russian law results from *Kruglov and others v Russia* (n 1158), para 137, as regards non-Bar members.

1237 *Kruglov and others v Russia* (n 1158), para 132. Note that in *Kruglov*, the Court – in contrast to *Heino* and *Golovan* –, did not focus on 'quality of the law', but instead found that 'the searches in the present cases impinged on professional confidentiality to an extent that was disproportionate to the legitimate aim being pursued', ibid, para 136.

1238 Ibid, para 145.

1239 *Golovan v Ukraine* (n 1056), para 50, featuring a third-party intervention by the Union Internationale des Avocats; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 61, featuring a third-party intervention by the International Commission of Jurists.

1240 *Elçi and others v Turkey* (n 1067), para 669.

ject to especially strict scrutiny',[1241] whereupon the Court 'ha[d] to explore the availability of effective safeguards against abuse or arbitrariness under domestic law and check how those safeguards operated in the specific case under examination'.[1242] The focus in these later cases was consequently less on scrutiny specifically by the European Court of Human Rights, but by the domestic courts, exhorting the latter to exercise 'especially strict scrutiny'. In subsequent cases, the *Elçi* dictum has therefore not only been used to protect legal services by means of judgments of the European Court of Human Rights itself, but instead – in line with the principle of subsidiarity – also to demand stronger protection at the domestic level; in the cases concerned the domestic courts had either not been able to act[1243] or had granted excessively broad search warrants without serious scrutiny of the application.[1244] In this regard, use of the *Elçi* dictum may be symptomatic of a wider tendency in the Court's case law: the realisation, from the late 1990s and the corresponding surge in case numbers onwards, that without effective defence of human rights at the domestic level the Convention system will rapidly overload and break down.

1241 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Heino v Finland* (n 1158), para 43; *Golovan v Ukraine* (n 1056), para 62; *Yuditskaya and others v Russia* (n 1158), para 27; *Annagi Hajibeyli v Azerbaijan* (n 1158), para 68; slightly rephrased in *Kruglov and others v Russia* (n 1158), para 125.

1242 *Aleksanyan v Russia* (n 1158), para 214; *Kolesnichenko v Russia* (n 1158), para 31; *Yuditskaya and others v Russia* (n 1158), para 27; *Kruglov and others v Russia* (n 1158), para 125.

1243 As in *Heino v Finland* (n 1158), para 44, where 'there was no independent or judicial supervision when granting the search warrant as the decision to authorise the order was taken by the police themselves', leading to a situation in which '[t]he applicant's right to respect for her home was thus violated by the fact that there was no prior judicial warrant and no possibility to obtain an effective judicial review a posteriori of either the decision to order the search or the manner in which it was conducted', ibid, para 45, a 'situation … aggravated by the fact that the search took place in an attorney's office'. See also *Kruglov and others v Russia* (n 1158), para 137, as regards non-Bar-member lawyers.

1244 *Aleksanyan v Russia* (n 1158), para 216; *Kolesnichenko v Russia* (n 1158), para 32; *Yuditskaya and others v Russia* (n 1158), para 28-30; *Kruglov and others v Russia* (n 1158), paras 127, 129. *Golovan v Ukraine* (n 1056), para 60, is perhaps something of a special case, since the Court simply assumed that 'the current status of the domestic law thus afforded the authorities full discretion' (ibid, para 60), based on its assumption that the Ukrainian law that 'documents relating to a lawyer's professional activity may not be examined, divulged or seized without the lawyer's consent' (ibid, para 35) had to be subject to unwritten exceptions, cf Chapter Two, n 372 and accompanying text.

Finally, in terms of the Court's reasoning, the aforementioned separation between individual and public-interest issues is also supported by the fact that two cases from the *Elçi* line of cases make explicit reference to international (soft-law) materials on the position of lawyers, which also typically focus on lawyers as a prerequisite of the rule of law rather than simply as bearers of certain private interests.[1245] The first of these two cases is *Elçi* itself, where the UN Basic Principles on the Role of Lawyers were mentioned,[1246] without, however, the Court clarifying what weight (if any) it gave these. Moreover, the recent case of *Kruglov and others v Russia* contains reference to the UN Basic Principles,[1247] Recommendation R(2000)21[1248] and Recommendation R(2018)2121,[1249] which made reference to a number of further materials in the context of the drafting of a 'European Convention on the Profession of Lawyer'.[1250] Both *Kruglov*[1251] and *Aliyev*[1252] also contain reference to soft-law documents on the protection of human rights defenders.[1253] In addition to highlighting the Court's desire to display its findings in these highly controversial cases as the result of a broad, pan-European[1254] consensus, these references to quasi-legislative

1245 eg United Nations, *Basic Principles on the Role of Lawyers* (1990), penultimate preambulatory paragraph; Committee of Ministers of the Council of Europe, *Recommendation R(2000)21 on the Freedom of Exercise of the Profession of Lawyer* (2000), preamble, although it is also worth noting that individual parts of these documents have also been cited in some of the cases from the *Nikula* line of cases. These documents are discussed in Chapter One, 34ff.

1246 *Elçi and others v Turkey* (n 1067), para 564.

1247 *Kruglov and others v Russia* (n 1158), para 104.

1248 Ibid, para 103.

1249 Ibid, para 105.

1250 Specifically, the Court mentioned 'the Council of Bars and Law Societies of Europe's Charter of Core Principles of the European Legal Profession, the International Association of Lawyers' Turin Principles of Professional Conduct for the Legal Profession in the 21st Century and the International Bar Association's Standards for the Independence of the Legal Profession, International Principles on Conduct for the Legal Profession and Guide for Establishing and Maintaining Complaints and Discipline Procedures', ibid, para 105. On the project of a European Convention on the Profession of Lawyer see Chapter One at 47.

1251 Ibid, para 104.

1252 *Aliyev v Azerbaijan* (n 1070), para 88ff.

1253 Note that similarly to the *Nikula* dictum it appears that the *Elçi* dictum will not require Bar membership to apply, since eg in *Kruglov* the Court went from reference to the *Elçi* dictum to the finding that even non-Bar member legal representatives had to have some level of additional protection under the Convention (*Kruglov and others v Russia* (n 1158), para 125ff, particularly at para 137).

1254 And, as concerns the UN Basic Principles, even global.

materials suggest that the Court is aware that it is departing from the narrow confines of the case at hand.

The Court's case law, then, reveals a difference between interference with the rights of individual lawyers (which may or may not be justified, as the case may be) and interference with 'the legal profession', which can never be justified. In these latter cases, the Court will draw on the *Elçi* dictum and apply 'especially strict scrutiny' – which, given that the Court has never, to date, moved from here to a finding of 'no violation', will effectively mean that the Court will find a violation of the Convention.

That suggests, then, that the Court's case law may actually contain a hierarchy of norms.[1255] While interference with the activities of individual lawyers can be justified subject to certain conditions, where the State's activities have an impact on legal services *generally* this can never be justified. On this view, the question becomes more about distinguishing between these two groups of cases.

3. 'The legal profession'

The above, then, indicates that in addition to the rights of clients and of lawyers, there is a third, more diffuse element in the Court's case law: 'the legal profession'. This is perhaps the most difficult part of the Court's case law to analyse, at least on a traditional analysis based only on Convention rights.[1256] 'The legal profession' is neither an individual, a non-governmental organisation nor a group of (identifiable) individuals within the meaning of Art. 34 and therefore unable to bring individual applications.[1257] Nor is 'the legal profession' part of the State, given the clear position that the Court has taken that 'a lawyer, even if officially appointed, cannot be considered to be an organ of the State'.[1258] On the other hand, 'the legal profession' is also clearly not a legal nullity; the Court, in its case law, has made a number of references to how it expects 'the legal profession' to be.

1255 For greater detail on the different duties the Convention imposes on States in this area see Chapter Nine.

1256 Discussing this see Chapter Eight.

1257 For an analysis that questions whether all Convention norms must comport rights in this way see Chapter Seven.

1258 *Siałkowska v Poland* (n 1087), para 99, and the section on State responsibility for the actions of lawyers in individual cases in Chapter Two, 122ff.

These include, first and foremost, independence. As the Grand Chamber put it in *Morice v France* (2015), 'independence of the legal profession … is crucial for the effective functioning of the fair administration of justice'.[1259] 'Independence of the legal profession', moreover, has also come up in a number of other cases, particularly in those regarding effective legal aid.[1260] This 'independence' appears to be primarily directed against the State. While for those cases relating to effective legal aid the Court has said as much directly (referring to 'the independence of the legal profession from the State'),[1261] as regards the *Morice* line of cases it appears clear from the context. In *Morice*, the Court noted that '[t]he question of freedom of expression is related to the independence of the legal profession'.[1262] While the Court did not clarify as much, it seems from the situation on which the Court was adjudicating that it was trying to avoid or limit situations in which State authorities would have to decide on whether or not a lawyer was permitted to make certain statements.

In addition to being 'independent', this 'legal profession' must be able to 'provide effective representation'. In a number of cases on freedom of expression in the courtroom,[1263] the Court has highlighted that '[f]or the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation',[1264] using this to justify greater protection for lawyers' statements in the courtroom.

1259 *Morice v France [GC]* (n 1070), para 135. The quote also appears in *Siałkowska v Poland* (n 1087), para 111, *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), para 45, *Radobuljac v Croatia* (n 1097), para 61, and *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.

1260 HUDOC lists this phrase in a total of 82 cases, the first of which is the *Kamasinski v Austria* (n 1065) judgment discussed above (ibid, para 65, and Chapter Two, 122ff). In keeping with the *Kamasinski* case, most cases using the phrase 'independence of the legal profession' relate to the State's responsibility in cases regarding allegedly deficient provision of legal aid.

1261 Ibid, para 65.

1262 *Morice v France [GC]* (n 1070), para 135; *Bono v France* (n 1259), para 45; *Radobuljac v Croatia* (n 1097), para 61; *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.

1263 See Chapter Three, 158ff.

1264 *Kyprianou v Cyprus [GC]* (n 1063), para 175; *Kincses v Hungary* (n 1096), para 34; *Morice v France [GC]* (n 1070), para 132; *Helmut Blum v Austria* App no 33060/10 (ECtHR, 05 April 2016), para 64; *Radobuljac v Croatia* (n 1097), para 60; *Jankauskas v Lithuania (No 2)* (n 1110), para 74; *Lekavičienė v Lithuania* App no 48427/09 (ECtHR, 27 June 2017), para 51; *Correia de Matos v Portugal [GC]* (n

Furthermore, this 'legal profession' has a certain amount of 'dignity': As regards freedom of expression for lawyers, the Court has explicitly referred to 'the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession'.[1265] This latter point, dignity, is particularly important because it appears that the dignity of this ill-defined agglomeration can be opposed to the rights of individual lawyers.[1266] The Court has explicitly held that lawyers 'are subject to restrictions on their professional conduct, which must be discreet, honest and dignified'.[1267]

Finally, as regards the collective term of 'the legal profession', the Court has of late shown greater awareness of the significance of collectives of lawyers. In recent cases, it has made reference to 'professional associations of lawyers'.[1268] The first of these references came in *Jankauskas v Lithuania (No 2)* (2017), where the Court 'reiterate[d] that professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently'.[1269] The Court has since

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1097), para 139; *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* (n 1097), para 88.

1265 *Schöpfer v Switzerland* (n 1096), para 33; *Nikula v Finland* (n 1061), para 46; *Wingerter v Germany (dec)* (n 1096) 6; *A v Finland (dec)* (n 1096) 11; *Amihalachioaie v Moldova* (n 1096), para 28; *Schmidt v Austria* App no 513/05 (ECtHR, 17 July 2008), para 36; *Kincses v Hungary* (n 1096), para 38.

1266 On this point see also Chapter Nine, 470ff.

1267 *Morice v France [GC]* (n 1070), para 133; *Radobuljac v Croatia* (n 1097), para 60; *Tuğluk and others v Turkey (dec)* (n 1096), para 35; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78. See also, with minor linguistic variations, *Casado Coca v Spain* (n 1092), para 46; *Steur v the Netherlands* (n 1096), para 38; *Böhm v Germany (dec)* (n 1096) 5; *Ignatius v Finland (dec)* (n 1096) 5; *Veraart v the Netherlands* App no 10807/04 (ECtHR, 30 November 2006), para 51; *Ayhan Erdoğan v Turkey* App no 39656/03 (ECtHR, 13 January 2009), para 26; *Jankauskas v Lithuania (No 2)* (n 1110), para 75; *Lekavičienė v Lithuania* (n 1264), para 52; *Correia de Matos v Portugal [GC]* (n 1097), para 140; *Gestur Jónsson and Ragnar Halldór Hall v Iceland [GC]* (n 1097), para 88.

1268 This term seems to have been taken from the Preamble to Council of Europe Recommendation R(2000)21 on the freedom of exercise of the profession of lawyer, discussed in Chapter One, 38ff.

1269 *Jankauskas v Lithuania (No 2)* (n 1110), para 78. Given the close connection to the Bar Association in that case, it appears the Court will use 'professional associations of lawyers' as a synonym for Bar associations.

reprised this statement in three cases against Azerbaijan.[1270] Moreover, the Court has also referred to 'Bar Associations', who 'perform a self-regulation function'.[1271] While this does mean the Court has used several different terms to describe collectives of lawyers, it seems from the context that these are intended as synonyms: In both of the cases which make explicit reference to both 'professional associations of lawyers' and 'Bar associations', the Court moved fluidly from one term to the other, indicating that it understands them as substantially the same. However, since Bar associations *are* part of the State for Convention purposes,[1272] such 'professional associations of lawyers' are clearly not the same as 'the legal profession'.

These points are all rather abstract. However, the Court has, in a variety of judgments, provided indication of how it would like to see them operationalised. The following section examines these specific arrangements for 'the legal profession' in greater detail, focusing in particular on the extent and methods by which this 'legal profession' should be regulated.

II. Specific arrangements for legal services?

The Court, then, has stressed extensively how important lawyers and the provision of legal services are to the Convention system. Without legal services meeting certain quality criteria, full realisation of the Convention's goals is not possible. To ensure this, many domestic legal systems regulate the market for legal services, on the premise that State intervention is needed to ensure that the corresponding policy goals are met. Such regulation, however, is also subject to the fox-henhouse tension, discussed above, that one of the roles of legal services is to protect against the State. As a result, and as the Court has emphasised consistently, 'independence' is an important criterion for legal services, leading to a complex relationship between regulating the market for legal services and ensuring that lawyers remain independent.

1270 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

1271 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60. See also *Jankauskas v Lithuania (No 2)* (n 1110), para 78.

1272 See below 288ff.

These areas may initially seem entirely beyond the ambit of human rights law.[1273] However, given that the availability of high-quality legal services, which is a key requirement for the realisation of human rights, may depend on them, they are of crucial importance to the Convention rights. The following section therefore examines the assumptions the Court makes as regards the regulation of legal services, beginning with the extent to which the market for legal services should be regulated (1.) and following up with the question of how such regulation should be effected (2.).

1. A (partially) regulated market for legal services?

The first question, then, refers to the Court's position on regulating the legal services market in general. For example, should (certain) legal services be reserved to certain groups of persons, themselves subject to additional requirements as regards competence or personal qualities? While some systems in the Council of Europe States make extensive reservation in this regard, others assume that market forces will generate appropriate results, with both too much and too little restriction on the provision of legal services potentially generating harmful outcomes. Given the specificities of legal services which the Court has emphasised, the following section assesses whether the Court prefers an at least partially regulated market, perhaps with certain activities reserved to certain groups, which are themselves subject to additional requirements as regards competence or personal qualities.

(a) *Reservation of the provision of legal services*

From the case law, there is some indication that the Court assumes that legal services will in principle be regulated. In the two most recent cases on the legal profession in Azerbaijan, the Court merely made statements '[a]s regards the regulation of the legal profession',[1274] without dealing with the question of whether and to what extent such regulation is compatible in principle with the Convention. Similarly, in the *Nikula* dictum on the

1273 At least if one focuses exclusively on rights and corresponding directed duties. For an alternative analysis see Chapter Seven.

1274 *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

'special status of lawyers' and their 'central position in the administration of justice',[1275] the Court has justified 'restrictions on [lawyers'] professional conduct' by reference to the 'exclusive rights and privileges' that they supposedly enjoy, which again indicates broad approval for the regulation of legal services.

If regulation is therefore generally permissible, the obvious follow-up question is to what extent it is permissible under the Convention to reserve certain legal services to certain groups, reservations that the majority of Council of Europe countries make to a greater or lesser degree.[1276] To put it in terms more familiar in a human rights context: To what extent is it permissible to prohibit the general public from providing certain services? The point is all the more pressing since, as with many such reservations, even in the Court's case law there have been allegations of abuse,[1277] and increased regulation can be used as an excuse to interfere with the legal profession by States acting in bad faith.[1278]

Once again, the Court's statements have been largely oblique. Given that the Court uses the *Nikula* dictum consistently despite the fact that a lack of exclusive rights and privileges would seem to question the basis for additional restrictions on lawyers' professional conduct, the Court seems to take as its point of departure systems with robust reservations on certain legal services, 'exclusive rights and privileges', to use the Court's diction.

1275 cf 227ff.

1276 See for an introduction eg European Commission for the Efficiency of Justice, *European judicial systems: CEPEJ Evaluation Report - Part 1: Tables, graphs and analyses*, 2020) 71, although this focuses on monopolies on legal representation and largely ignores monopolies on out-of-court legal services.

1277 See eg *De Moor v Belgium* App no 16997/90 (ECtHR, 23 June 1994), paras 10, 46, and *Misson v Belgium (dec)* App no 41357/98 (ECtHR, 10 May 2001) 2. In both cases, the applicants alleged – not entirely unreasonably, given the justifications given by the local Bar authorities for refusing to admit them – that the Bar associations had been trying to use their power of admission to keep the number of practising lawyers in the region artificially low and thereby ensure their economic gain. Furthermore, the applicant in *Turczanik v Poland* App no 38064/97 (ECtHR, 05 July 2005), para 32ff, even managed to secure a decision by the Office for the Protection of Competition and Consumers finding that 'the Bar Association engaged in monopoly practices restraining competition in the service provision market', which, however, was ultimately overturned.

1278 cf eg Human Rights House Foundation, 'International standards and mechanisms must protect all lawyers regardless of Bar membership' (2021) <https://humanrighthouse.org/articles/international-standards-and-mechanisms-must-protect-all-lawyers-regardless-of-bar-membership/> accessed 08 August 2024.

Unsurprisingly, the Court does not, in principle, seem to disagree with reservation of legal services to certain groups, and indeed seems to see this as the norm rather than the exception, particularly since eg where the applicant does not fulfil the criteria under domestic law to provide legal services, the Court will, inter alia, not see their position as protected by Art. 1 of Protocol 1.[1279]

Despite this underlying preconception of a legal services sector with a significant number of reserved activities, as regards the question of who, under the Court's case law, may be allowed to provide legal services, the States will enjoy an extremely wide margin of appreciation. Across the Council of Europe, there are a wide variety of different regulatory models, ranging from near-total reservation[1280] to almost total deregulation of the legal services market.[1281] However, in the Court's case law there are significantly fewer cases on provision of legal services by non-Bar members than by those who belong to the Bar. This may be a result of the Court's focus on traditional roles for lawyers, such as criminal litigation, where such reservations are more frequent,[1282] as well as the fact that much of the older case law was developed before the largely deregulated legal services markets joined the Convention.

The Court has not voiced overt criticism of either of these conceptual points of departure. Instead, in *Kruglov*, as regards the comparatively deregulated legal services market in the Russian Federation, it held that '[i]t is for States to determine who is authorised to practise law within their jurisdictions, and under what conditions'.[1283] Even though, as noted, the latter model questions the foundations of some of the Court's case law,[1284] the Court has not objected to it. Instead, it has interacted with a wide range of different reservation provisions, without usually questioning their general permissibility under the Convention. While, in addition to the historical reasons identified above, this position is in keeping with the Court's generally more permissive standard of review where States make policy choices, it does seem somewhat ironic that despite the larger number of persons affected, abstract prohibitions restricting the provision of legal

1279 *Hoerner Bank GmbH v Germany (dec)* App no 33099/96 (ECtHR, 20 April 1999) 5.
1280 eg Germany.
1281 eg, while it was still a Member State, the Russian Federation.
1282 cf European Commission for the Efficiency of Justice (n 1276) 71.
1283 *Kruglov and others v Russia* (n 1158), para 137.
1284 Notably the *Nikula* line of cases with their focus on 'exclusive rights and privileges'.

services seem subject to less scrutiny than interference with individual cases. In essence, this means that for States attempting to interfere with the provision of legal services it would be simpler to limit the number of lawyers severely, rather than resorting to harassment in individual cases; from this point of view, the legal profession as a whole arguably seems to enjoy a level of protection weaker than that which individual lawyers enjoy, in stark contrast to the *Elçi* dictum.[1285]

i. *Reservations based on qualification*

The type of reservation that comes up most frequently in the Court's case law is that of certain minimum qualifications, frequently combined with requirements such as admittance to a professional organisation such as a Bar association.[1286]

Given that such reservations can limit Convention rights, it is worth clarifying, first and foremost, that the Court is of the opinion that restrictions on the provision of legal services can in principle be justified. This is clear eg from *Bigaeva v Greece* (2009), where the Court noted that while the refusal to admit the applicant to the Bar examination constituted an interference with her private life, that interference had been provided for by law and had pursued the legitimate aim of the prevention of disorder, since its goal was to regulate access to the Bar and therefore to a profession which participated in the good administration of justice.[1287] Implicitly, the Court therefore also accepted the reservation for which Greek law in principle provided, given that the Court made no criticism in this respect, a finding perhaps even clearer in *Buzescu v Romania* (2005), where the Court explicitly found 'protect[ing] the public by ensuring the competence of those carrying on the legal profession' to be a legitimate aim for Convention purposes.[1288] Similarly, in a number of other cases surrounding the field of restrictions on who may provide certain legal services, the Court has raised no general issues as regards such restrictions, or has even noted

1285 Discussed at 240ff.
1286 Frequently, these also convey a particular status that comes with a reserved title.
1287 *Bigaeva v Greece* (n 1084), para 31.
1288 *Buzescu v Romania* (n 1070), para 93.

that ensuring minimum qualification is a legitimate aim.[1289] Elsewhere, the Court has approved a regulated market, as in *Buzescu v Romania*, where it noted that the Romanian Union of Lawyers, which was 'invested with administrative as well as rule-making prerogatives', 'pursue[d] an aim of general interest in relation to the legal profession by exercising a form of public control over, for instance, registration with the Bar'.[1290]

From the Court's point of view, restrictions intended to correct the market failure caused by legal services' status as a credence good are also unproblematic. For example, 'the legal requirement for defence counsel to hold a law degree' is not a violation of Art. 6 § 3 (c) ECHR,[1291] 'since the particular legal qualifications can be required to ensure the efficient defence of a person … and the smooth operation of the justice system'.[1292] Similarly, the Court has found reservation of legal services before eg superior courts compatible with the Convention.[1293] This was particularly clear in the Grand Chamber's judgment in *Meftah and others v France* (2002), where the Court even noted that '[a]dmittedly, the aim of [the applicants] is above all to challenge the monopoly enjoyed by members of the *Conseil d'Etat* and Court of Cassation Bar, a monopoly the Government consider to be justified by the special nature of the proceedings in question'.[1294] It then went on to find that

> it is clear that the special nature of proceedings before the Court of Cassation, considered as a whole, may justify specialist lawyers being reserved a monopoly on making oral representations … and that such a reservation does not deny

1289 cf eg *Hoerner Bank GmbH v Germany (dec)* (n 1279) 5, '[t]out d'abord, la modification de la loi sur le conseil juridique poursuivait un but d'intérêt général : réglementer la profession de conseil juridique, en garantissant au public la compétence de ceux qui l'exercent', 'firstly, the amendment of the Legal Advice Act pursued a legitimate aim in the public interest: to regulate the profession of legal advisor in order to guarantee to the public the competence of those practicing it' (author's translation). Note that the Court also went on to find that subjecting the relevant probate activity in question to a requirement of prior authorisation was not disproportionate to the legitimate aim pursued.

1290 *Buzescu v Romania* (n 1070), para 78.

1291 *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009), para 39; *Zagorodniy v Ukraine* App no 27004/06 (ECtHR, 24 November 2011), para 52.

1292 *Zagorodniy v Ukraine* (n 1291), para 53.

1293 As the European Commission for the Efficiency of Justice (n 1276) 71 notes, restrictions on legal services typically increase from instance to instance.

1294 *Meftah and others v France [GC]* App no 32911/96 and others (ECtHR, 26 July 2002), para 45 (emphasis in original).

> applicants a reasonable opportunity to present their cases under conditions that do not place them at a substantial disadvantage.[1295]

In later judgments, the Court has summarised this line of its case law by noting that

> the requirement that an appellant be represented by a qualified lawyer before the court of cassation, such as applicable in the present case, cannot, in itself, be seen as contrary to Article 6. This requirement is clearly compatible with the characteristics of the Supreme Court as a highest court examining appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe.[1296]

This case law has also been upheld where the applicant has wanted to choose a representative who, while a member of the Bar, did not have standing specifically before the appellate court concerned.[1297] While such a reservation of legal services before superior courts is therefore permissible, there is, conversely, no obligation to create such a reservation. In other cases, the Court has also approved systems which do not restrict access in this way,[1298] and explicitly permitted a move to abolish such a system in *Wendenburg and others v Germany (dec)*.[1299]

In addition to these judgments concerning reservation of certain activities, the Court has also held that it is permissible to reserve certain titles. As such, titles which evoke a certain amount of additional expertise can

1295 Ibid, para 47.

1296 *Staroszczyk v Poland* (n 1088), para 128. See also *Arciński v Poland* App no 41373/04 (ECtHR, 15 September 2009), para 35, *Smyk v Poland* App no 8958/04 (ECtHR, 28 July 2009), para 58, *Anghel v Italy* App no 5968/09 (ECtHR, 25 June 2013), para 54.

1297 *Vogl v Germany (dec)* App no 65863/01 (ECtHR, 05 December 2002), approving the German system of limited standing rights before the Federal Court of Justice Civil Division.

1298 cf eg *Rivera Vazquez and Calleja Delsordo v Switzerland* App no 65048/13 (ECtHR, 22 January 2019) with reference to the standing rules regarding the Swiss Federal Supreme Court, which in principle also permits litigants in person.

1299 *Wendenburg and others v Germany (dec)* App no 71630/01 (ECtHR, 06 February 2003). The case is noticeable in that the Court preferred this general point to the more specific question of whether there had been an interference with the applicants' rights, where it expressed serious doubts but left the question open (ibid 24). Moreover, the case is also notable for the significant variations in the number of lawyers practising in each field, which in some areas were in the low double digits, ibid 17.

be reserved to those who fulfil certain requirements, as is clear from the admissibility decision in *Heimann v Germany (dec)*.[1300]

Moreover – and in keeping with the Court's *Nikula* dictum justifying 'exclusive rights and privileges' by reference to additional burdens – reservations can also be made conditional on performing certain additional obligations. It is not impermissible to expect lawyers to maintain their qualifications through continuing professional development obligations; in the admissibility decision in *Krikorian v France (dec)*, where the applicant argued that continued learning obligations constituted degrading treatment in the Art. 3 sense,[1301] the Court did not even dignify this rather absurd submission with a response. Moreover, such reservation may also be contingent on additional contributions to the administration of justice, such as handling certain cases in the public interest. Where, for example, a pupil *avocat* was required to act without remuneration,[1302] the Court did not find that this constituted 'compulsory labour' within the meaning of Art. 4 § 2.[1303] Additional responsibilities for those who enjoy an exclusive right to perform certain activities are therefore in principle permissible.

ii. *Reservations based on personal standing*

Beyond these reservations based upon a minimum level of (legal) qualification, a number of States also make reservations based on personal standing. In the Court's case law, these have typically come in two forms, either attached to certain professions deemed incompatible or attaching directly to features such as the applicant's 'character'.

For example, the Court in *Lederer v Germany (dec)* found it permissible to ban all civil servants from Bar membership as insufficiently 'independent', even those who – like German university professors – had other guarantees of independence under domestic law. Given that the Court considered that it was undeniable that the measure pursued a legitimate aim, that of guaranteeing the independence of the legal profession in the interest of the good administration of justice, this did not constitute a

1300 *Heimann v Germany (dec)* (n 1117) 7.
1301 *Krikorian v France (dec)* App no 6459/07 (ECtHR, 26 November 2013), para 47.
1302 *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983), para 24.
1303 See also *Graziani-Weiss v Austria* App no 31950/06 (ECtHR, 18 October 2011), para 42.

Convention violation.[1304] As the Court put it, there was an incompatibility in principle between the status of permanent civil servant, characterised by the pre-eminence of the public law link which united them with the State, and that of lawyer, the latter exercising an essentially liberal profession and occupying a central role as an independent officer of the court.[1305] The respondent State had not therefore exceeded its (wide)[1306] margin of appreciation. Similarly, in *Lykourezos v Greece* (2006) the Court did not question the Convention-compliance of a total ban on members of parliament being members of the Bar,[1307] but merely focused on the specifics of the case and the fact that the applicant had been deprived of his seat in parliament despite having been elected in full accordance with the prior legal rules, which had not contained absolute incompatibility.[1308] While therefore generally permissible, it does seem that the Court will require such incompatibility rules to be rather clear, given that in *Mateescu v Romania* (2014) it found a violation of Art. 8 because

> the wording of the legal provisions regulating the practice of the profession of lawyer was not sufficiently foreseeable to enable the applicant … to realise that the concurrent practice of another profession, not enumerated among those excluded by the law, entailed the denial of his right to practise as lawyer.[1309]

In addition to these formal rules on incompatibility with other professions, the Court has also ruled on whether it is permissible to restrict provision of legal services to those with a certain 'good character'. For example, in *Döring v Germany (dec)* the Court found it permissible to ban an ex-GDR judge who had participated in a number of politically motivated trials[1310] from becoming an attorney, noting inter alia that lawyers were persons

1304 *Lederer v Germany (dec)* App no 6213/03 (ECtHR, 22 May 2006) 8.
1305 Ibid 7.
1306 Ibid 8.
1307 *Lykourezos v Greece* App no 33554/03 (ECtHR, 15 June 2006), para 53: 'In the instant case, the applicant has invited the Court to censure the absolute nature of the disqualification in question, and especially the wide interpretation given to it by the Special Supreme Court in the absence of the implementing legislation envisaged by the Constitution. Nevertheless, however interesting those aspects of this case may be, it is not the Court's task to state its view on the general prohibition on practising any profession; it confines itself to observing that this blanket prohibition, created by the new Article 57 of the Constitution, introduces a disqualification that is rarely encountered in other European States.'
1308 Ibid, para 57.
1309 *Mateescu v Romania* App no 1944/10 (ECtHR, 14 January 2014), para 32.
1310 *Döring v Germany (dec)* App no 37595/97 (ECtHR, 09 November 1999) 2.

who, by reason of the nature of the functions they exercised within the rule of law, were subject to particularly high standards of integrity and morality[1311] and that these restrictions also aimed to protect the public by guaranteeing the integrity and morality of those exercising the profession of attorney.[1312] Similarly, in *Kayasu v Turkey* (2008), in which following his dismissal as a prosecutor the applicant was also banned from working as an attorney,[1313] the Court made no allusion, critical or otherwise, to this point despite the applicant's direct insistence on it. Moreover, the Court has also found that 'it is clearly within the margin of appreciation afforded to the Contracting States to provide by law that members of the profession of lawyers who no longer have appropriate financial resources and have been declared bankrupt should no longer exercise that profession'.[1314] The Court has also found no violation of the Convention where a domestic rule restricts admission to the Bar to nationals of that country and EU citizens.[1315]

In line with this, it is also permissible for States to have rules that being convicted of certain criminal offences will lead to automatic disbarment. For example, in *Biagioli and Biagioli v San Marino (dec)*, the applicant's 'disbarment was a result of his having been found guilty of a criminal offence, namely making false declarations in public documents, for which he was sentenced to two years imprisonment'.[1316] The Court 'consider[ed] that in providing for the impugned sanction (applied by the relevant organs), which was established by the legislator and not subject to individual discretion, the respondent State did not overstep its margin of appreciation', 'not only because of the criminal element but particularly because of the relation between the offence at issue and the mentioned professions' of lawyer and notary.[1317]

1311 Ibid 7, 'personnes qui, de par la nature des fonctions qu'elles exercent au sein d'un l'Etat [sic] de droit, sont soumis à des exigences d'intégrité et de moralité particulièrement élevées'.

1312 Ibid 7, although as discussed Chapter Three at 198 the Court did also highlight the exceptional circumstances of German reunification.

1313 *Kayasu v Turkey* App no 64119/00; 76292/01 (ECtHR, 13 November 2008), paras 46, 53.

1314 *Klein v Austria* App no 57082/00 (ECtHR, 03 March 2011), para 53.

1315 *Bigaeva v Greece* (n 1084), para 40.

1316 *Biagioli and Biagioli v San Marino (dec)* App no 8162/13 (ECtHR, 08 July 2014), para 103.

1317 Ibid, para 103.

Beyond these legal limitations on the legal profession, there are also de facto limitations on compatibility between the legal profession and judicial functions which arise from other areas of the Court's case law. For instance, while the Court has been keen to highlight that it is possible 'that legislation and practice on the part-time judiciary in general can be framed so as to be compatible with Article 6',[1318] this is an area where States will have to be particularly careful if they want to avoid their part-time judges falling foul of Art. 6 § 1's 'independent and impartial' limb. As regards lawyers sitting as part-time judges, these cases have usually concerned doubts arising from previous interactions, whether between the part-time judge and the defendant State[1319] or regarding interactions between the lawyers concerned outside of their judicial roles.[1320]

Finally, personal reservations intended to promote access to justice are also permissible according to the Court. In the admissibility decisions in *Appas v Greece (dec)* and *Svintzos v Greece (dec)*, the Court upheld Greek procedural rules limiting standing before courts to lawyers registered with the local Bar association on the basis that these had pursued the aim of incentivising lawyers to set up their practice in more remote areas, thereby securing access to justice for underprivileged regions,[1321] which the Court explicitly classed as a legitimate public-interest aim.[1322]

iii. *Liberalising tendencies*

While the Court thus takes a tolerant position in terms of reservations, and eg the *Nikula* dictum seems to indicate that the Court assumes that such restrictions will exist at the domestic level, the Court has also not objected to liberalisation at the domestic level.

1318 *Wettstein v Switzerland* App no 33958/96 (ECtHR, 21 December 2000), para 41; *UTE Saur Vallnet v Andorra* App no 16047/10 (ECtHR, 29 May 2012), para 48; similar wording in *Steck-Risch and others v Liechtenstein* App no 63151/00 (ECtHR, 19 May 2005), para 39. For an instance of a similar problem where a lawyer later joined the judiciary see *Meznaric v Croatia* App no 71615/01 (ECtHR, 15 July 2005).

1319 eg *UTE Saur Vallnet v Andorra* (n 1318), which concerned a case in which the part-time judge was a partner of a law firm which advised the defendant government.

1320 eg *Wettstein v Switzerland* (n 1318), in which the part-time judge had, in the course of his main profession as a lawyer, previously acted against one of the parties' lawyers, giving rise to doubts as to his impartiality.

1321 *Appas v Greece (dec)* (n 1059) 7; *Svintzos v Greece (dec)* (n 1059) 4.

1322 *Appas v Greece (dec)* (n 1059) 10; *Svintzos v Greece (dec)* (n 1059) 5.

For example, in *Wendenburg and others v Germany (dec)*,[1323] which concerned a change in German procedural law allowing all lawyers access to the appellate courts,[1324] the Court found the complaint manifestly ill-founded where the applicants 'complained under Article 1 of Protocol No. 1 that the change of law abolishing exclusive rights of audience in the courts of appeal had deprived them of their means of existence, thereby violating their right to property' and 'hindered them in the exercise of their profession and adversely affected their family life' contrary to Art. 8 because they had been 'deprived … of their livelihood'.[1325] Given the extensive reasoning adduced by the domestic Federal Constitutional Court in striking down the system of exclusive rights of audience as unconstitutional, and emphasising heavily the fact that there had even been a transitional period allowing the applicants to prepare for the loss of their monopoly,[1326] the Court found that, leaving open the question of whether there had been an interference with the applicant's rights under Art. 1 Protocol 1, this had in any case been proportionate.[1327] Moreover, the Court also does not object to the provision of legal services by non-Bar lawyers, as a variety of cases in which such lawyers have acted show.[1328]

(b) *A sustainable economic basis?*

These reservations, of course, essentially create an oligopoly. Competition on the legal services market is limited to the market participants.[1329] This raises a closely related question, the economic dimension of legal services. A legal services sector that can fulfil its constitutional tasks needs a sustainable economic basis, even if professional organisations of lawyers typically present this as a subordinate factor.[1330] The experts which protection of hu-

1323 *Wendenburg and others v Germany (dec)* (n 1299).

1324 Replacing the prior and highly fragmented system by which, in some states, only those lawyers registered with exclusive rights of audience were allowed to plead before the courts of appeal.

1325 *Wendenburg and others v Germany (dec)* (n 1299) 19.

1326 Ibid 26.

1327 Ibid 26. The Court did not examine Art. 8 separately.

1328 eg *Rozhkov v Russia (No 2)* App no 38898/04 (ECtHR, 31 January 2017); *Mikhaylova v Ukraine* (n 1136).

1329 And may be further limited by rules such as mandatory pricing arrangements.

1330 cf eg the criticism by the Romanian National Bar Association in *Mateescu v Romania* (n 1309), para 14, that 'in wanting to practise both professions [that of

man rights requires need some level of minimum income to allow them to keep engaging in their activities. Simultaneously, this economic dimension of legal services involves a number of difficult questions of balancing: Lawyers need to be able to earn their keep, but if legal services are paid for by clients they need to be affordable enough to fulfil the requirements of access to justice. These are complex questions that touch upon the relationship between lawyers, clients and the State.

Moreover, in terms of how they balance these various interests, the Council of Europe States differ drastically. Category 7.1 of the World Justice Report[1331] regarding Civil Justice 'measures the accessibility and affordability of civil courts, including whether people … can access and afford legal advice and representation'. As the European Court of Human Rights has remarked in cases such as *Steel and Morris v UK* (2005),[1332] the cost of legal advice and representation can be a factor preventing the effective exercise of human rights. While some Council of Europe States score highly on 'People can access and afford civil justice', with the Netherlands, Denmark and Germany occupying the first, third and fourth place out of the 140 countries surveyed, other States do less well, with Moldova coming 80th and the United Kingdom coming 89th. On the other hand, the profession of providing legal services needs to remain attractive enough to encourage individuals to undertake this career path, which requires that it is possible to make a living this way. Since there is therefore a clear connection between the economics of legal services and public functions, it is worth inquiring into the limits of the State's margin of appreciation in this regard.

Despite this crucial importance, the economic side of legal services is one of the areas least illuminated in the Court's case law, in keeping with the difficulties in framing this essential precondition of a functioning legal services sector in terms of a violation of a Convention obligation towards any one individual.[1333] In fact, the question of a sustainable economic basis for the legal services sector has been hardly asked, let alone answered, which

lawyer and of doctor], the applicant demonstrated only his extreme mercantilism [sic], as he "minimised the importance of these professions, treating them as mere sources of income"'.

1331 Available at https://worldjusticeproject.org/rule-of-law-index/factors/2022/Civil%20Justice/, accessed 08 August 2024.

1332 *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005).

1333 And in keeping with the fact that the Court generally seems to just assume that legal services will exist at the domestic level. Both points are discussed in greater detail in Chapter Seven and Chapter Eight.

is all the more noticeable given that in a number of cases applicants have alleged that the legal services provided to them were of poor quality due to the lawyers' inability – or unwillingness – to devote sufficient attention to a matter that was poorly remunerated.[1334] However, in other cases, the Court has dealt with the economic side of legal services without exhibiting any awareness that sufficient economic preconditions are a necessary prerequisite of a functioning legal services sector.[1335]

At times, the Court has at least shown an implicit awareness that lawyers need to have some way of enabling them to make enough money to remain in that profession. This is clear from, for example, the admissibility decisions in *Appas v Greece (dec)* and *Svintzos v Greece (dec)*, where the Court classed rules creating a financial incentive to set up law firms in underprivileged areas as a legitimate public-interest aim.[1336] Moreover, the question of the legal profession's economic basis also underlies some of the cases on freedom of expression for lawyers outside the courtroom. This is most obviously true for those cases which, like *Casado Coca v Spain* (1994),[1337] concern advertising directly, but also for other cases, where domestic authorities have sometimes taken the view that lawyers speaking out in public were in reality simply trying to circumvent domestic prohibitions on advertising[1338] in order to increase their income. Nonetheless, the Court has held in a number of cases that (severely) restricting advertising by lawyers can be permissible,[1339] given that, in the Court's view, this concerns the general question of unfair competition, an area 'which the Court has regarded as complex and fluctuating and in which thus a certain margin of appreciation appears essential'.[1340]

As regards general systems for remuneration of lawyers, the Court has not voiced any preferences. Its case law is replete with both private

1334 *Jelcovas v Lithuania* App no 16913/04 (ECtHR, 19 July 2011), para 22, which the Court dismissed at para 130. Note also Judge Bonello's vocal criticism in the Polish cases on legal aid, eg *Antonicelli v Poland* App no 2815/05 (ECtHR, 19 May 2009) 16, where, in his concurring opinion, he made reference to legal-aid lawyers in Poland being 'almost coerced to work for a pittance'.

1335 *Klein v Austria* (n 1314), where the Court showed no awareness that the purpose of the pension scheme in questions was inter alia to ensure lawyers' independence.

1336 *Appas v Greece (dec)* (n 1059) 10; *Svintzos v Greece (dec)* (n 1059) 5.

1337 *Casado Coca v Spain* (n 1092), particularly at para 44ff.

1338 *Schöpfer v Switzerland* (n 1096), para 14.

1339 cf eg *Brzank v Germany (dec)* (n 1117).

1340 *Heimann v Germany (dec)* (n 1117) 6.

fee agreements[1341] and systems which eg fix certain minimum fees or payscales.[1342] Similarly, as regards legal services performed at the level of the Court itself, the Court has awarded costs for a variety of different remuneration models.[1343] Generally, it seems as though the Court may be willing to accord a comparatively wide margin of appreciation in cases regarding extent of fees under domestic law, in keeping with the rather specific nature of this point, often finding that it is enough that the domestic courts' decisions were sufficiently reasoned and did not disclose any arbitrariness.[1344] An underlying reason in this regard may be the Court's position that disputes regarding remuneration between a lawyer and their client do not arise from 'private and family life' within the meaning of Art. 8, and are litigation between individuals over which the Court does not have jurisdiction *ratione materiae,*[1345] although it is worth noting the general tendency of Art. 8 to expand over the years.[1346]

In general, it seems, then, that the Court has not provided much clarification on the economic dimension of legal services, nor addressed the related wide disparities in access to justice across the Council of Europe States. This stands in stark contrast to the practical significance of economic questions, which, after all, require fine balancing to ensure both the survival of the legal profession and access to justice for individuals.[1347] Similarly to many other areas concerning complex policy choices, the Court has not issued much by way of statements, but instead seems to largely just hope for the best.

1341 *Kandarakis v Greece* App no 48345/12 and others (ECtHR, 11 June 2020), para 60.
1342 *Konstantin Stefanov v Bulgaria* (n 1071), para 25; *Marčan v Croatia (dec)* App no 67390/10 (ECtHR, 13 September 2016).
1343 cf eg Jens Meyer-Ladewig and Kathrin Brunozzi, 'Art. 41' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention - Handkommentar* (4th edn, Nomos 2017), para 33.
1344 *Marčan v Croatia (dec)* (n 1342), para 40.
1345 *SCP Huglo, Lepage & Associés, Conseil v France (dec)* App no 59477/00 (ECtHR, 11 February 2003) 9.
1346 cf eg *Denisov v Ukraine [GC]* App no 76639/11 (ECtHR, 25 September 2018).
1347 *Airey v Ireland* App no 6289/73 (ECtHR, 09 October 1979) being a classic case – ultimately, Johanna Airey's problem only arose through the combination of lawyers' fee structure and her inability to pay these fees herself.

2. A separate administrative regime for legal services?

The creation of a regulated market in the sense of restriction of legal services to certain persons raises the question how this special legal regime is administered. If lawyers, in their professional role,[1348] are a separate category of persons subject to different rules, does that imply a separate administrative-law regime regulating 'the legal profession'[1349]? In essence, the Court's case law in this area consists of two limbs. One relates to a special set of rules ensuring that those protected by these reservations comply with certain minimum behavioural standards – disciplinary law ((a).). The other ((b).) relates to the administrative structures by which these rules are applied, termed 'Bar associations' here regardless of varying domestic nomenclature.[1350]

(a) *Separate disciplinary rules?*

Given the Court's assumption of 'exclusive rights and privileges' which justify the restrictions on lawyers' professional conduct,[1351] one point of major significance is ensuring that only those who comply with these restrictions reap the benefits of the exclusive rights and privileges. In essence, the question is that of disciplinary law, in the sense of a separate body of domestic-law rules that aim to secure the public interest in the 'proper' exercise of the legal profession and apply only to those individuals that exercise it. Paraphrasing the goals of provisions of domestic law, the Court has described the aim of this area of law as 'protect[ing] the honour and reputation of the profession, as well as maintaining the trust the public places in the legal profession'.[1352] Conceptually, disciplinary law shores up the reservations discussed above, since the legal profession typically receives the advantage of reservation of certain activities at the price of increased regulation of individual lawyers by means of a separate set of rules.

1348 On role-bearer rights from a conceptual point of view see Chapter Eight, 419ff.

1349 On the latter term see 257ff.

1350 cf Chapter One, 65ff.

1351 See 227ff.

1352 *Biagioli v San Marino (dec)* App no 64735/14 (ECtHR, 13 September 2016), para 55. See also *Müller-Hartburg v Austria* App no 47195/06 (ECtHR, 19 February 2013), para 45.

i. *Disciplinary law as a particularly sensitive area*

Disciplinary law is a sensitive area because it is particularly open to abuse. It frequently contains sanctions which interfere with or prohibit the exercise of the legal profession and can therefore be used to harass those who take politically unpopular cases, making it particularly dangerous to human rights defenders.[1353] It consequently comes as no surprise that disciplinary law figures prominently in a number of international soft-law documents, such as Recommendation R(2000)21[1354] or the UN Basic Principles,[1355] which have also been referred to by the Court.[1356] Moreover, questionable use of disciplinary rules has similarly surfaced in the Court's jurisprudence.[1357]

A proper understanding of the Court's case law on disciplinary proceedings, however, necessitates two contextual notes. The first of these is that disciplinary law is heavily inter-related with the general domestic rules on the provision of legal services. Taking this one element out of the context of the general regulation of legal services at the national level is therefore somewhat myopic. This is perhaps clearest for the term 'disbarment', which, in an international context, is something of a false friend. Disbarment ostensibly means a similar thing in most systems – exclusion from a professional organisation of lawyers coupled with the loss of certain privileges.

1353 This is also frequently stressed as an argument in favour of limiting restrictions on legal services, since otherwise human rights defenders may be subject to regulation by authorities acting in bad faith.

1354 Where one of the six 'Principles' is devoted to disciplinary proceedings, cf Committee of Ministers of the Council of Europe, Principle VI. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

1355 Where the final section, which contains four of the 29 paragraphs, falls under the heading 'Disciplinary proceedings', cf UN Basic Principles on the Role of Lawyers, para 26ff. The UN Basic Principles are discussed in Chapter One, 34ff.

1356 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 39ff; *Namazov v Azerbaijan* (n 1058), para 30ff; *Bagirov v Azerbaijan* (n 1097), para 39ff; *Demirtaş and Yüksekdağ Şenoğlu v Turkey* App no 10207/21; 10209/21 (ECtHR, 06 June 2023), para 64. Indeed, in *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60, *Namazov v Azerbaijan* (n 1058), para 50, and *Bagirov v Azerbaijan* (n 1097), para 101, the Court even 'consider[ed] it necessary to draw attention to Recommendation R(2000)21' explicitly.

1357 See eg *Bagirov v Azerbaijan* (n 1097), but also *Reznik v Russia* (n 1096), para 43, where the Russian Ministry of Justice had asked the Moscow City Bar to disbar one of Mikhahil Khodorkovskiy's lawyers on grounds that the Bar classed as spurious.

However, disbarment's practical impact differs drastically because the underlying restrictions on providing legal services are not the same. While in a system in which in principle *all* legal services are restricted to Bar members,[1358] expulsion from the Bar is effectively equivalent to a ban on providing legal services, in other systems the impact may be far less drastic.[1359] This is an important contextual factor: While in some systems disbarment means the end of a lawyer's career, in others it may only exclude certain types of restricted activity and may therefore be less severe in its effects.

Nonetheless, similarly to many of the other problems that hinge on a more holistic view of the relevant country's legal profession, this is not a problem the Court has visibly engaged with. None of the judgments surveyed for the present study set out the context of reserved activities at the domestic level,[1360] even though this is crucial to understanding the severity of the sanction in practice. In the absence of identical rules on reserved activities, disbarment in one jurisdiction cannot be equated with disbarment in another jurisdiction, but nonetheless the Court has held comprehensively that 'disbarment … cannot but be regarded as a harsh sanction, capable of having a chilling effect on the performance by lawyers of their duties as defence counsel'[1361] and has claimed that disbarment has

1358 Such as Germany, cf s 3 of the Act on Out-of-Court Legal Services, English translation available at http://www.gesetze-im-internet.de/englisch_rdg/, accessed 08 August 2024.

1359 Note eg the Russian Government's submission in *Igor Kabanov v Russia* (n 1096), para 49 that the disbarred applicant 'could act as a legal representative of a party to proceedings even without being a member of the bar', the Government's argument that 'even though the Bar Association may expel a member as a disciplinary measure, this does not prevent the person from acting as legal counsel in court proceedings or from practicing law in others fields' in *A v Finland (dec)* (n 1096) 7, or the Government's argument in *Jankauskas v Lithuania (No 2)* (n 1110), para 53 that the case was different from *Bigaeva v Greece* (n 1084) 'because the applicant had actually had the possibility to work in the legal area' in a variety of roles.

1360 There is a passing reference to this in *Bagirov v Azerbaijan* (n 1097), para 116, but this concerns the application of Art. 41 and was not part of the Court's reasoning regarding the merits of the case.

1361 *Namazov v Azerbaijan* (n 1058), para 50; see also *Bagirov v Azerbaijan* (n 1097), para 83, and *Igor Kabanov v Russia* (n 1096), para 55, where this quote appears to originate from. The key, perhaps, is in the term 'defence counsel', since that appears to be the area where activities are most strongly reserved, cf European Commission for the Efficiency of Justice (n 1276) 71. The Court's use of the term 'chilling effect' to denote that a certain minimum activity level is desirable is discussed in Chapter Six, 335ff.

'irreversible consequences on the professional life of a lawyer'.[1362] All of this is not to say that disbarment is anything other than a severe sanction; the point, for present purposes, is simply that disbarment in a system with a broad reservation of legal services is not the same as disbarment in a system with a narrow one, and that, more generally, the context of the specific system of reservation in the country in question is significant.

A second preliminary note concerns the purpose of disciplinary law. This is all the more important because, at times, the Court seems to confuse it with criminal law, treating disciplinary law as a milder version of criminal sanctions rather than as a system of rules with different purposes.[1363] Of particular note is the cryptic statement in *Schmidt v Austria* (2008):

> Finally, the Court notes that in contrast to the case of Nikula …, what was at stake was not a criminal penalty but a disciplinary sanction. The Court reiterates that the special position of lawyers as intermediaries between the public and the courts explains the usual restrictions on the conduct of members of the Bar. Given the key role of lawyers it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.[1364]

It seems from context that the Court may have meant that criminal penalties will be harder to reconcile with the Convention than disciplinary sanctions, in keeping with its holding in *Nikula* that '[i]t is … only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society'.[1365] If this is the case, however, it mistakes the fundamentally different nature of criminal and disciplinary sanctions, which pursue different goals. Disciplinary law aims to uphold certain quality standards among lawyers. Disciplinary provisions deal not so much with punishment for past incidents, but with the question of who in future is

1362 *Bagirov v Azerbaijan* (n 1097), para 101.

1363 cf eg *Kyprianou v Cyprus [GC]* (n 1063), para 180, *Mikhaylova v Ukraine* (n 1136), para 95 (where the Court appears to have called disciplinary measures 'a less severe sanction' on the same scale) and the points made in Chapter Three at n 736. This is somewhat surprising given that in other contexts the Court has heard extensive explanations as to the different nature of criminal and disciplinary sanctions, cf eg *Müller-Hartburg v Austria* (n 1352), para 37, and that one would think that the differences between the two sanction mechanisms are fairly obvious.

1364 *Schmidt v Austria* (n 1265), para 42.

1365 *Nikula v Finland* (n 1061), para 55.

suitable to provide legal services.[1366] By nature, they are forward- rather than backward-facing in the sense of being aimed at preventing future harms. As such, situations may arise that call for both criminal and disciplinary sanctions,[1367] but equally many situations are conceivable which call for only one of the two responses.[1368] Disciplinary sanctions, when compared to criminal sanctions, are not a 'less severe' form – they pursue a different purpose.

To the extent that disciplinary law aims to uphold certain general requirements for the legal profession, it is closely linked to the public interest in legal services conforming to a certain quality. Despite the Court's sometimes confusing statements as to the relationship between criminal and disciplinary sanctions, when the Court pays closer attention it does seem to be aware that these two are fundamentally different. For example, it has held that Article 4 of Protocol 7, the right not to be tried or punished twice, does not prohibit disciplinary proceedings following a criminal conviction.[1369] In a similar vein, the Court has also explicitly held that Art. 6 § 1 does not apply to disciplinary proceedings under its criminal head,[1370] nor will Art. 7 of the Convention apply.[1371] This position regarding lawyers harmonises well with the position regarding disciplinary proceedings against civil servants,[1372] reflecting lawyers' singular semi-public status.

1366 As the Solicitors Regulation Authority puts it in its guidance on parallel investigations (https://www.sra.org.uk/solicitors/guidance/investigations-parallel/, accessed 08 August 2024) 'the character and purpose of civil, criminal and regulatory proceedings are different. The purpose of disciplinary proceedings against a person convicted of a criminal offence is not to punish them a second time for the same offence, but to protect the public and to maintain high professional standards and public confidence'.

1367 The classic example perhaps being misappropriation of clients' moneys.

1368 For example, criminal behaviour not likely to bring the profession into disrepute will not call for disciplinary sanctions, while violations of professional standards without violating the criminal law will not call for criminal ones.

1369 cf *Müller-Hartburg v Austria* (n 1352), para 63, confirmed in *Helmut Blum v Austria* (n 1264), para 59. In German-language jurisdictions, this is frequently referred to as the 'disciplinary-law surplus' or '*disziplinärer Überhang*', cf *Müller-Hartburg v Austria*, para 28.

1370 *Zerouala v France (dec)* App no 46227/08 (ECtHR, 03 May 2011) 7; *Müller-Hartburg v Austria* (n 1352), para 49; *Helmut Blum v Austria* (n 1264), para 59; *Biagioli v San Marino (dec)* (n 1352), para 51ff.

1371 *Brown v UK (dec)* App no 38644/97 (ECtHR, 24 November 1998) 5ff.

1372 *Moullet v France (dec)* App no 27521/04 (ECtHR, 13 September 2007); *Vagenas v Greece* App no 53372/07 (ECtHR, 23 August 2011).

ii. *Disciplinary law as a component of the Court's vision*

Having clarified both the need to contextualise disciplinary proceedings and the need to separate them from criminal proceedings, it is now possible to turn to the Court's case law on disciplinary proceedings in greater detail. In keeping with its general position assuming a regulated market for legal services, the Court sees the existence of disciplinary law as a legitimate concern, indeed even as a necessary ingredient in its view of the regulation of the legal profession. In *Bono v France* (2015), the Fifth Section clarified that 'it is certainly the task of the judicial and disciplinary authorities, in the interest of the smooth operation of the justice system, to take note of, and even occasionally to penalise, certain conduct of lawyers'.[1373] Similarly, in *Tuheiava v France (dec)*, a Committee of the Fifth Section highlighted that a visit by a member of the Bar to ascertain whether professional rules were being followed contributed to the defence and preservation of the relationship of confidence between a lawyer and their clients,[1374] and in *Biagioli and Biagioli v San Marino (dec)* the Court highlighted that 'the disbarment of the second applicant … pursued the legitimate aim of protecting the public by ensuring the integrity of those carrying out the legal profession and also the proper administration of justice'.[1375] In *Helmut Blum v Austria* (2016), which concerned an interim measure withdrawing the applicant lawyer's right to represent clients before certain courts in criminal proceedings,[1376] the Court even 'acknowledge[d] that situations can arise in which it can be justified to take interim measures to protect public interests and the reputation of a legal profession',[1377] and 'accept[ed] the Government's argument that the measure aimed to protect public interests and the reputation of the legal profession and therefore the administration of justice itself'.[1378]

1373 *Bono v France* (n 1259), para 55. The Court does not clarify what it means by 'take note of … certain conduct of lawyers'.

1374 *Tuheiava v France (dec)* (n 1098), para 33, author's translation. The original reads 'La Cour considère dès lors que la visite du bâtonnier, garant de la déontologie de son barreau, s'inscrivait notamment dans le cadre de la défénse et de la préservation de cette relation de confiance entre un avocat et ses clients'.

1375 *Biagioli and Biagioli v San Marino (dec)* (n 1352), para 102.

1376 *Helmut Blum v Austria* (n 1264), para 32.

1377 Ibid, para 64.

1378 Ibid, para 64. Similarly, in *Bagirov v Azerbaijan* (n 1097), para 97, the Court accepted that the applicant's disbarment for statements made in court 'had pursued the legitimate aim of "the prevention of disorder" within the meaning of Article 8 § 2

(1) *Lower requirements for 'quality of the law'*

If all of this tends towards a generally permissive view as regards disciplinary law, that is not merely limited to principle, but also manifests in a more relaxed standard as regards the 'quality of the law' requirement for lawyers' disciplinary codes. In part this can be explained by the Court's general tendency to assume that lawyers are particularly able to foresee the content of laws,[1379] but in part the Court also seems to apply less strict scrutiny. In a number of States, even those with comparatively strong human-rights track-records, disciplinary codes for lawyers are couched in vague language, frequently using open terms such as the legal profession's 'dignity',[1380] 'honour' or 'reputation',[1381] or indeterminate obligations such as that to show 'proper respect' towards the judiciary.[1382] In addition to historical reasons, this is typically based on the need to allow disciplinary authorities to react flexibly to problems as they arise. Despite arguable problems as regards foreseeability, the Court has typically tolerated these rules. While in the early days of the Court's case law this may have been based on something of a European consensus on such indeterminate rules, which were offset in practice by sufficient case law to clarify their concrete ambit and by an independent and impartial judiciary, where these conditions are not met, such indeterminate clauses are far more open to abuse than more concrete rules listing specifically which types of behaviour will be prohibited.

A partial relaxation of this 'quality of the law' standard, however, does not mean arbitrariness is permitted. In *Hajibeyli and Aliyev v Azerbaijan* (2018), the Court reiterated that refusal to grant the applicants access to

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of the Convention, since it concerns the regulation of the legal profession which participates in the good administration of justice'.

1379 cf Chapter Two, n 610ff and accompanying text and, specifically noting that 'a lawyer … could reasonably have been expected to be familiar with the dense range of provisions relating to lawyers' professional ethics', *Demertzis v Greece (dec)* App no 12766/15 (ECtHR, 04 April 2023), para 11.

1380 *Hempfing v Germany (dec)* App no 14622/89 (Commission Decision, 07 March 1991) 282; *Foglia v Switzerland* (n 1098), para 35. See similarly *Lindner v Germany (dec)* (n 1096) 6, and *Veraart v the Netherlands* (n 1267), para 35.

1381 *Malek v Austria* App no 60553/00 (ECtHR, 12 June 2003), para 33; *Müller-Hartburg v Austria* (n 1352), para 24. For an example of the potential for abusing such clauses see eg *Bagirov v Azerbaijan* (n 1097), para 27ff.

1382 cf *Rodriguez Ravelo v Spain* (n 1073), para 25. See also *Furuholmen v Norway* (n 1096) 8.

the legal profession could not be based 'on grounds not envisaged by the relevant domestic legislation'.[1383] The Court even

> consider[ed] it necessary to draw the Government's attention to Recommendation R(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, which clearly stated that lawyers should enjoy freedom of expression and that decisions concerning access to the profession should be subject to review by an independent and impartial judicial authority.[1384]

(2) *Procedural rights in disciplinary law*

Moreover, while Art. 6 § 1 does not apply to disciplinary proceedings under its criminal head,[1385] which leads to a number of procedural safeguards not applying, the Court has nonetheless highlighted the importance of procedural rights in disciplinary proceedings, particularly where disbarment is concerned.[1386]

Under the Court's constant case law, revocation of admission to the Bar concerns the determination of a civil right in the sense of Art. 6 § 1,[1387] since disciplinary proceedings in which the right to continue to exercise a profession is or may be at stake fall under Art. 6 § 1's civil limb.[1388] Art. 6 § 1 ECHR can therefore apply to proceedings before Bar associations where they affect 'a lawyer's civil right to continue exercising his or her profession',[1389] which extends even to interim proceedings where these can be 'considered to determine effectively the civil right at stake'.[1390] While this criterion is fairly obviously fulfilled in cases where, as in *Müller-Hartburg v Austria* (2013), the sanction at issue actually is being struck off the

1383 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.
1384 Ibid, para 61. Recommendation R(2000)21 is discussed in Chapter One, 38ff.
1385 *Müller-Hartburg v Austria* (n 1352), para 49, as well as the other cases listed in n 1370.
1386 *Namazov v Azerbaijan* (n 1058), para 49.
1387 *Albert and Le Compte v Belgium* App no 7299/75; 7496/76 (ECtHR, 10 February 1983), para 48; *De Moor v Belgium* (n 1277), para 47; *Scheiber v Germany (dec)* App no 60585/00 (ECtHR, 06 November 2003) 6.
1388 *Biagioli v San Marino (dec)* (n 1352), para 49; *Müller-Hartburg v Austria* (n 1352), para 39; *Helmut Blum v Austria* (n 1264), para 60. This case law continues to the present day, cf recently *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021), para 183 with reference to *Malek v Austria* (n 1381).
1389 *Müller-Hartburg v Austria* (n 1352), para 48.
1390 *Helmut Blum v Austria* (n 1264), para 66.

register,[1391] the Court has held elsewhere that it will suffice that a temporary or permanent suspension of the right to practice is a hypothetically possible outcome of the procedure, even if the charge itself is so minor as to render this outcome unlikely.[1392] Elsewhere, it has sufficed that 'when the proceedings were started, expulsion from the bar was not impossible'.[1393] Depending on domestic regulatory techniques, which typically on paper permit a wide spectrum of possible sanctions to allow domestic bodies to react appropriately to the severity of the individual case, in practice this means that many, if not most, disciplinary proceedings against lawyers will fall within the ambit of Art. 6 § 1.

To date, the most important elements of Art. 6 § 1 protection in disciplinary proceedings appear to have been related to length of proceedings.[1394] However, there has also been some debate on the 'independent and impartial tribunal' guarantee,[1395] and as regards certain procedural guarantees. In this latter respect, the Court has held in particular that in principle Art. 6 § 1 will give the right to an oral hearing in disciplinary proceedings against a lawyer,[1396] and that this will apply even to interim measures

1391 *Müller-Hartburg v Austria* (n 1352), para 40.

1392 *Hurter v Switzerland (dec)* App no 53146/99 (ECtHR, 08 July 2004) 5; *Landolt v Switzerland (dec)* App no 17263/02 (ECtHR, 31 August 2006) 5; *Foglia v Switzerland* (n 1098), para 62.

1393 *A v Finland (dec)* (n 1096) 9.

1394 cf *Müller-Hartburg v Austria* (n 1352), para 56, where the Court found a violation where proceedings lasted nine years and eleven months, *Schmidt v Austria* (n 1265), para 24 (violation where proceedings lasted eight years and one month), *Malek v Austria* (n 1381), para 37 (violation where proceedings lasted six years and seven months) as well as *Goriany v Austria* App no 31356/04 (ECtHR, 10 December 2009), where the Court focused on the fact that, faced with a mountain of complaints against the applicant, the disciplinary authorities had shown no interest in avoiding delays. There appears to have been something of a structural problem in Austria in this regard, as the Court alludes to in *Schmidt v Austria* (n 1265), para 27.

1395 *Lindner v Germany (dec)* (n 1096) 11, with reference to *Albert and Le Compte v Belgium* (n 1387), which established that professional disciplinary bodies must 'either themselves comply with the requirements [of Article 6 § 1], or they do not so comply but are subject to subsequent review by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1'.

1396 *Hurter v Switzerland* App no 53146/99 (ECtHR, 15 December 2005), para 35. Regarding Switzerland's historical difficulties with this point and the (invalid) reservation declared upon accession to the Convention see *Weber v Switzerland* App no 11034/84 (ECtHR, 22 May 1990), para 38.

where 'not only legal or highly technical questions had to be taken into consideration'.[1397]

iii. *Delegation to professional bodies*

A special feature that has caused particular debate in relation to Art. 6 § 1 is the fact that in many domestic systems lawyers are involved in their own disciplinary procedures. The Convention gives States significant leeway in this regard. Where States have a first instance outside their ordinary judicial structures – such as a professional body hearing cases at first instance – those bodies will not necessarily even have to comply with the requirements of Art. 6 § 1 themselves, as long as there is a means of challenging them before a judicial authority that does satisfy the requirements of Art. 6 and has full jurisdiction.[1398]

Commonly, in a bid to ensure 'independence' of the legal profession, as well as to increase expertise, lawyers are involved as judges at some point in the disciplinary process, which can raise problems under Art. 6 § 1 particularly as regards the 'independent and impartial' tribunal if there is no such possibility of a full appeal. Indeed, in *Landolt v Switzerland (dec)* the applicant even pressed the point regarding the involvement of lawyers, arguing that since the members of the body that had decided his case did not necessarily have to be licensed as lawyers, they were therefore not competent to judge his compliance with the rules of professional conduct, and that hence the disciplinary body composed of the presidents of the courts was not sufficiently impartial. The Court, however, argued that the presidents of the courts had neither common nor contrary interests to those of the lawyers and did not agree.[1399] While in *Landolt* the applicant

1397 *Helmut Blum v Austria* (n 1264), para 72.

1398 *Le Compte, Van Leuven and De Meyere v Belgium* App no 6878/75; 7238/75 (ECtHR, 23 June 1981), para 51; *Buzescu v Romania* (n 1070), para 60; *Landolt v Switzerland (dec)* (n 1392) 6. Further detail on what 'full jurisdiction' will mean for these purposes is provided in eg *Biagioli v San Marino (dec)* (n 1352), para 58ff.

1399 *Landolt v Switzerland (dec)* (n 1392) 8, 'L'absence de brevet d'avocat n'implique nullement que les juges ne seraient pas compétents pour apprécier si un comportement particulier constitue une infraction aux règles déontologiques', 'the absence of a practising certificate in no way implies that judges would not be competent to assess whether a particular behaviour constitutes a breach of the rules of professional conduct' (author's translation).

criticised a conflict of interests with judicial functions, there have been other cases in which applicants were dissatisfied with the very fact that their peers, other lawyers, had been called upon to judge them.[1400]

Moreover, the Court has implicitly endorsed an obligation on lawyers to cooperate with their regulators where the latter are contemplating disciplinary proceedings. This seems to follow from *Jankauskas v Lithuania (No 2)* (2017), in which the Court emphasised that

> [n]otwithstanding the absence of an explicit, written requirement to indicate previous, even expired, conviction when applying to the Bar, the Court does not find it unreasonable that the domestic authorities should conclude that such an obligation flowed from notions of honesty and ethics and the idea that the relationship between an advocate and the Bar Association must be based on mutual respect and good-will assistance,

and that the Bar Association therefore had a right to 'full information about a person wishing to become an advocate'.[1401] 'In that connection, the Court note[d] that in its Recommendation R(2000)21, the Committee of Ministers of the Council of Europe has emphasised that the profession of an advocate must be exercised in such a way that it strengthens the rule of law'.[1402]

iv. *Conclusion: Separate disciplinary rules for lawyers*

As has been shown, much suggests that the Court's implicit view of legal services is that of a regulated market. Disciplinary rules form a key element in this regulatory structure, but there is tension with independence, which is a quality requirement for legal services which the Court has also explicitly identified. While the Court therefore sees disciplinary rules as a legitimate concern, subject to certain rules as regards, in particular, the procedures by which such regulation is enforced, a key point is how rules

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1400 *Versteele v Belgium (dec)* App no 12458/86 (Commission Decision, 18 January 1989) 122, where the application argued that 'particularly in such a small Bar, lawyers with interests conflicting with those of the applicant must be regarded as unfavourable to him', as well as the challenge brought in *De Moor v Belgium* (n 1277), para 51.

1401 *Jankauskas v Lithuania (No 2)* (n 1110), para 78.

1402 Ibid, para 77. The quote also appears in *Lekavičienė v Lithuania* (n 1264), para 54, which the Fourth Section decided on the same day, and is reprised in *Correia de Matos v Portugal [GC]* (n 1097), para 141. Recommendation R(2000)21 is discussed in Chapter One, 38ff.

controlling behaviour by the legal profession can be reconciled with the latter's 'independence', which is discussed in the next section.

(b) *The role of Bar associations*

Given the assumption that legal services will be a regulated market, with a separate set of provisions regulating market entry and standards for those participating in the market, the question arises how this market should be administered. The point is all the more complicated because high-quality legal services, in the Court's view, must be independent from the State. While the assumption of a regulated market implies State involvement, the requirement of independence militates against it.

A number of the international documents mentioned in Chapter One attempt to resolve this tension by means of specific administrative arrangements. Frequently, this is done by granting a certain measure of 'independence' to regulators for the legal profession, often combined with involvement by lawyers themselves, reflecting ideas of self-regulation. The underlying assumption, roughly speaking, is as follows: The interests of the State, particularly of the executive, can conflict with the interests of clients and their lawyers, especially where these are involved in adversarial proceedings against the State, as is frequently the case in human rights work. Letting the State regulate lawyers therefore risks enabling the State to use its regulatory powers abusively to prevent the effective exercise of legal services against the State. To remedy this conflict of interest, so the reasoning goes, lawyers should be regulated by an organisation independent of the State. Frequently, this is taken to mean that lawyers should be trusted to regulate themselves – yet in self-regulation the threat of regulatory capture looms large.

For these and for historical reasons,[1403] domestic law often creates professional bodies invested with legal powers devoted exclusively to representing and regulating lawyers. References to these professional associations, which will be termed Bar associations for short here,[1404] are not uncommon in the Court's case law despite the seemingly incongruous inclusion of references

1403 Further references to the development of lawyer guilds in Leslie Levin and Lynn Mather, 'Beyond the Guild: Lawyer Organizations and Law Making' (2019) 18 Washington University Global Studies Law Review 589, 591.

1404 cf Chapter One, 65ff.

to specific administrative structures in a legal instrument designed to secure individual rights. Perhaps particularly clear is *Jankauskas v Lithuania (No 2)* (2017), where the Court noted that 'professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently, and that respect towards professional colleagues and self-regulation of the legal profession are paramount',[1405] drawing a link between the individual lawyer's independence and the self-regulation of the legal profession.[1406] Similar points have also come up in other recent cases concerning the situation in Azerbaijan.[1407]

This part of the Court's case law is complex. Given that human rights are largely understood as concerning primarily the realisation of private interests,[1408] questions of administrative structure are, on a traditional understanding, at best on the fringes and at worst beyond the mandate of a human rights court. The fiction typically underlying the Convention is that the Court will assess only whether the Convention guarantees have been fulfilled, and that – outside explicit provisions such as eg the 'independent and impartial tribunal established by law',[1409] which, however, do not exist for legal services – how States go about ensuring this result is their choice. In essence, the Court will usually mandate obligations of result in the sense that a Convention-compliant *outcome* must be reached, but it is generally up to States to work out how they want to get there. Seen in this light, explicit statements on how States must administer their community of lawyers seem out of place in a human rights context to the extent that the Court is not mandating just a specific human rights outcome, but also the way this must be achieved, ie by means of (independent) lawyers and (potentially) 'self-regulation of the legal profession'.

Moreover, a further difficulty in these cases is that as regards clients, lawyers and Bar associations there are two groups of actors that act on behalf of others. Only clients can act exclusively in their own interests.

1405 *Jankauskas v Lithuania (No 2)* (n 1110), para 78. Note that this wording is close to Recommendation R(2000)21, particularly the fourth preambulatory paragraph.

1406 Arguably, this skips several steps, since independence of the individual lawyer on its own would prima facie call only for independence of the regulator, not necessarily *self*-regulation.

1407 *Jankauskas (No 2)* is reprised almost word-for-word in *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

1408 See, in greater detail, Chapter Eight.

1409 On different possible analyses of this limb of Art. 6 § 1 see Chapter Seven, 366ff.

Lawyers act on behalf of clients; Bar associations are supposed to act in the public interest, as well as on behalf of lawyers' and clients' interests. Here, rights are granted not primarily to further the interests of the rights holder, but also to further the interests of others. This gives rise to complicated conceptual questions.[1410]

The following sections deal with the Court's case law on Bar associations, beginning with their position as part of the State (i.), and then turning to the Court's statements concerning the 'independence' of Bar associations (ii.).

i. *Bar associations as part of the State*

Lawyers, as has been shown, are not part of the State according to the Court.[1411] Bar associations, however, are. Notwithstanding certain degrees of independence at the domestic level, Bar associations will generally form part of the State at least if they wield public-law competencies such as controlling admission to the legal profession or disciplining lawyers. Despite the fact that Bar associations are frequently composed of, elected by and tasked with representing the interests of lawyers, the Court will still generally[1412] class Bar associations as part of the State. Bar associations do not participate in lawyers' non-State status, despite their role in representing lawyers' interests, but are, for Convention purposes, part of the State much like any other administrative body, which manifests in a number of ways.[1413] This means that the dividing line between the State and non-State spheres runs in between lawyers and their professional organisations; while the former are not part of the State, the latter will be.

1410 See Chapter Eight, particularly at 419ff.

1411 cf the position the Court took in the cases regarding provision of legal aid (Chapter Two, 122ff) and the memorable quote from *Siałkowska* that 'a lawyer, even if officially appointed, cannot be considered to be an organ of the State', *Siałkowska v Poland* (n 1087), para 99.

1412 The Court's reasoning often focuses on the specific arrangements at the domestic level – to the extent ascertainable, there have not yet been any cases where the Court has rejected the State's responsibility for the actions of a Bar association.

1413 eg their ability to trigger State responsibility under the Convention, the application of Art. 6 § 1 to Bar disciplinary proceedings, and their lack of standing under Art. 34, all of which are discussed in greater detail below.

(1) *State responsibility for Bar associations*

That Bar associations are, for Convention purposes, part of the State has been established as far back as *van der Mussele v Belgium* (1983).[1414] In that case, the Legal Advice and Defence Office of the Antwerp Bar appointed the applicant, a pupil *avocat*, to a case as defence counsel.[1415] The applicant complained that, since 'he had not been entitled to any remuneration or reimbursement of his expenses', there had been both '"forced or compulsory labour" contrary to Article 4 § 2 of the Convention and … treatment incompatible with Art. 1 of Protocol No 1'.[1416] The respondent government, however, argued that 'it was … not answerable for any infringements of the Convention's guarantees that might be occasioned by implementation of the professional rules' because these had been 'freely adopted by the Ordres des avocats themselves' without the Belgian State's involvement.[1417]

'[C]ounsel for the Government did not revert [to this argument] at the hearings before the Court'.[1418] Nonetheless, the Court thought it significant enough to dedicate a discrete passage of the 22-page judgment to, under the separate heading 'responsibility of the Belgian state'.[1419] The Court noted its – still rather rudimentary, given that *Airey* had been decided only a little over four years earlier – case law on 'the obligation to grant free legal assistance', pointing out that '[t]he Belgian State … lays the obligation by law on the Ordres des avocats' and that therefore '[s]uch a solution cannot relieve the Belgian State of the responsibilities it would have incurred under the Convention had it chosen to operate the system itself'.[1420] The Court then held that

> [i]n addition, the Belgian Bars, bodies that are associated with the exercise of judicial power, are, without prejudice to the basic principle of independence

1414 *Van der Mussele v Belgium* (n 1302).
1415 Ibid, para 10.
1416 Ibid, para 24. He also complained under Art. 14 taken in conjunction with Art. 4. For a recent case involving similar arguments see *Dănoiu and others v Romania* App no 54780/15 and others (ECtHR, 25 January 2022).
1417 *Van der Mussele v Belgium* (n 1302), para 28.
1418 Ibid, para 29, presumably because it was rejected by the Commission.
1419 Ibid, para 28ff.
1420 Ibid, para 29. Implicitly, this also rejects the notion of a relative quality of public-ness – conceptually, it would also have been possible to characterise the relationship between the Legal Advice and Defence Office and the applicant lawyer independently of the relationship between that Office and recipients of legal advice.

> necessary for the accomplishment of their important function in the community, subject to the requirements of the law. The relevant legislation states their objects and establishes their institutional organs; it endows with legal personality in public law each of the Councils of the twenty-seven local Ordres and the General Council of the National Ordre …
>
> The responsibility of the Belgian State being thus engaged in the present case, it has to be ascertained whether that State complied with the provisions of the Convention.[1421]

While the reference to being 'subject to the requirements of the law' is hardly a helpful criterion, given that in a State based on the rule of law everyone, even private individuals, is or should be 'subject to the requirements of the law', and there is arguably something of a logical disconnect in merely stating that the responsibility is 'thus engaged' without explaining *why* it is engaged, it seems as though the Court took a holistic view, focusing particularly on the fact that the Belgian Bars were 'associated with the exercise of judicial', and thereby 'public', 'power'.[1422] This suggests that the Court will generally see Bar associations that exercise at least some State functions as part of the State for the purposes of the Convention.

Van der Mussele, moreover, was not the only case in which the Government tried to absolve itself of responsibility for the actions of a Bar association. In a similar vein to *van der Mussele*, in *Casado Coca* (1994) the Government

> submitted that if there was an interference, it did not come from a 'public authority' within the meaning of Article 10, para 1. The Barcelona Bar Council's written warning … could be regarded as an internal sanction imposed on Mr Casado Coca by his peers. The Spanish State had merely ratified, in the form of a royal decree, the statute drawn up by the members of the Bar themselves, under Article 31 of which professional advertising was banned.[1423]

The Court, in a reprise of *van der Mussele*, rejected this argument:

> Like the applicant and the Commission, the Court notes, however, that section 1 of the 1974 Law on professional associations states that they are public-law corporations … In the case of the Bars, this status is further buttressed by their purpose of serving the public interest through the furtherance of free, adequate legal assistance combined with public supervision of the practice of the profession and of compliance with professional ethics … Furthermore, the impugned decision was adopted in accordance with the provisions applicable

1421 Ibid, para 29–30.

1422 See similarly *Dösemealti Belediyesi v Turkey (dec)* App no 50108/06 (ECtHR, 23 March 2010) 7.

1423 *Casado Coca v Spain* (n 1092), para 38.

> to members of the Barcelona Bar and an appeal against it lay to the competent courts … These courts and the Constitutional Court, all of which are State institutions, upheld the penalty … That being so, it is reasonable to hold that there was an interference by a 'public authority' with Mr Casado Coca's freedom to impart information.[1424]

While this presented something of a mélange of arguments, given that there is some ambiguity regarding which 'interference by a "public authority"' the Court was referring to,[1425] the reasoning itself would tend to indicate that, similarly to *van der Mussele*, the Court considered the Bar association as a public authority for the purposes of the Convention. Ultimately, it would otherwise have been unnecessary to make any statements as to the Bar association, given that judgments by the domestic courts are indisputably 'interference by a "public authority"'. The fact that the Court nonetheless included argument as to the public status of Bar associations indicates that they, too, will be public authorities for the purposes of the Convention.

This approach has also been confirmed in later cases in which the State has been held responsible for the actions of Bar associations,[1426] for example in *Buzescu v Romania* (2005), where the Court, after making reference to *van der Mussele* and *Costello-Roberts* (2003),[1427]

> point[ed] out that the UAR [the Romanian Union of Lawyers, cf para 3] is legally constituted by Law no. 51/1995 and invested with administrative as well as rule-making prerogatives. The UAR pursues an aim of general interest in relation to the legal profession by exercising a form of public control over, for instance, registration with the Bar, and its decisions are subject to the jurisdiction of the administrative courts … The Court also takes note, as a subsidiary argument, of the classification of the UAR in the domestic case-law as a public authority that performs administrative acts and fulfils a public service role. It therefore concludes that State responsibility is engaged as a result of the administrative decisions of the UAR of which the applicant complains.[1428]

1424 Ibid, para 39 (citations omitted).

1425 Viz., the initial decisions by the Bar association or the subsequent decisions by the State courts upholding them. See similarly classing 'sanctions … as upheld by the Federal Court of Justice and the Federal Constitutional Court' as 'an interference by a "public authority"' *Lindner v Germany (dec)* (n 1096) 8.

1426 For another Belgian case, see eg *H v Belgium* (n 1083).

1427 Given that *Costello-Roberts* only contains the apodictic statement that 'the Court agrees with the applicant that the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals' (*Costello-Roberts v UK* App no 13134/87 (ECtHR, 25 March 1993), para 27) before itself referring to *Van der Mussele*, this arguably did not add very much.

1428 *Buzescu v Romania* (n 1070), para 78.

This also tends to suggest that the core criterion will indeed be whether the Bar association exercises State powers, but that generally, where Bar associations exercise at least some oversight functions, their actions will engender State responsibility. Indeed, by the time *Klein v Austria* (2011) was decided and the Government argued that the State could not be held responsible for the regulations established by

> the Chamber of Lawyers, which represented the interests of lawyers [and] had been established as a self-governing body with compulsory membership and democratic structures, in which the individual members had the opportunity to exert influence on the tenets of the group and, thus, also on the statutes of its pension scheme,[1429]

the Court merely laconically replied that 'the Chamber of Lawyers is not a private association but a public law body, and measures taken by that body therefore engage the responsibility of Austria as a State'.[1430]

(2) *Legal consequences of the State's responsibility for Bar associations*

Bar associations, to the extent they wield public power, will therefore count as part of the State irrespective of whether, under domestic law, they enjoy guarantees of independence which mean central government cannot (fully) control their actions. This classification as public bodies, with the State responsible for Bar associations' actions, has a number of consequences.

The first of these is that Art. 6 § 1 will apply, even beyond the disciplinary proceedings which have already been discussed above.[1431] The Court has held that Art. 6 § 1's guarantees also apply as regards, for example, admission to the Bar.[1432] Accordingly, in a case in which the Bar association took approximately six years to fully process the applicant's accession to the Bar, Art. 6 § 1 had been violated in its length-of-proceedings limb.[1433]

1429 *Klein v Austria* (n 1314), para 37.
1430 Ibid, para 46.
1431 275ff.
1432 *H v Belgium* (n 1083); *De Moor v Belgium* (n 1277).
1433 *Turczanik v Poland* (n 1277), para 38. The total time period was 15 years and five months (with a nine-year period during which the applicant appears not to have pursued his registration), with the limitation to six years *ratione temporis* resulting from the fact that Poland only recognised the right of individual petition on 1 May 1993.

Furthermore, rules adopted by Bar associations will also typically be classed as 'law' for the purposes of the Convention. To borrow the argument from *Barthold v Germany* (1985):[1434] Where independent rule-making power is traditionally enjoyed by way of parliamentary delegation and is 'exercised by the Council under the control of the State, which in particular satisfies itself as to observance of national legislation',[1435] as is the case for many Bar associations, such rules will count as 'law' and can therefore justify interference with Convention rights if the other requirements of Convention compliance are met. While *Barthold* itself concerned a council of veterinary surgeons,[1436] the reasoning which the Court adduced is readily transferable to situations where Bar associations are explicitly or implicitly vested with rule-making power under domestic law.[1437]

Similarly, the classification of Bar associations as part of the State for Convention purposes is also reflected in the fact that Art. 11 ECHR, which deals only with private associations, will not apply to them,[1438] at least as long as 'the provisions governing the activities of professional regulatory bodies' do not 'prevent practitioners from forming together or joining professional associations'.[1439] In this regard, the Court has held that Bar associations cannot be considered as 'associations' in the sense of Art. 11 § 1, since they are essentially public in nature, and that therefore Art. 11 is not applicable in cases concerning mandatory membership of a Bar association.[1440] Going one step further, the Court has also found that where the applicants, acting without State authorisation, had simply set up their own

1434 *Barthold v Germany* (n 1099).

1435 Ibid, para 46.

1436 Ibid, para 46.

1437 Which, indeed, reflects an option contained in a number of provisions of international instruments, eg UN Basic Principles on the Role of Lawyers, para 26 or Council of Europe Recommendation R(2000)21, Principle VI.1. Both documents are discussed in Chapter One, 34ff.

1438 *A and others v Spain (dec)* App no 13750/88 (Commission Decision, 02 July 1990). Although, as the Commission noted at para 2, this does not prevent lawyers from relying on Art. 11 to form further associations of professionals, such as region- or subject-specific interest groups. See also *National Notary Chamber v Albania (dec)* App no 17029/05 (ECtHR, 06 May 2008) 5ff.

1439 *A and others v Spain (dec)* (n 1438), para 2 with reference to *Le Compte, Van Leuven and De Meyere v Belgium* (n 1398).

1440 *A and others v Spain (dec)* (n 1438), para 1. *Bota v Romania (dec)* App no 24057/03 (ECtHR, 12 October 2004) 9; *National Notary Chamber v Albania (dec)* (n 1438) 6. In *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 42, the Court sidestepped the issue by 'consider[ing] that the applicants' complaint does not raise a separate issue

'Bar association',[1441] Art. 11 did apply due to the non-public nature of that organisation,[1442] but that the organisation's dissolution was compatible with the Convention since it served the legitimate aim of both the prevention of disorder and the protection of the rights and freedoms of others[1443] and was proportionate to that aim.[1444]

(3) *In particular: No standing for Bar associations under Art. 34 ECHR*

As a corollary of their actions triggering the State's responsibility under Art. 34, Bar associations are themselves precluded from bringing claims under Art. 34 ECHR because such complaints are incompatible *ratione personae* with the Convention.[1445]

While one might have guessed as much given the typically binary State/non-State divide in the Court's case law,[1446] Bar associations' close intertwinement with non-State lawyers raises some doubts in this respect, particularly since – similarly to media organisations, which *can* bring claims under Art. 34[1447] – the Court treats independence as a key requirement for Bar associations. That Bar associations, moreover, can make a significant contribution to the functioning of the Convention system is reflected not least in the recent change to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, which were amended in July 2022 to make it possible for

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under Article 11 of the Convention and falls to be examined solely under Article 10 of the Convention'.

1441 For a similar case from Ukraine which does not appear to have reached the European Court of Human Rights see International Commission of Jurists, *Between the Rock and the Anvil: Lawyers under Attack in Ukraine* (2020) 13.

1442 *Bota v Romania (dec)* (n 1440) 8. The Court went as far as noting that '[l]a Cour estime d'emblée que la dissolution de l'association 'Bonis Potra' constitue, sans conteste, une ingérence dans l'exercice du droit de ses membres à la liberté d'association', 'the Court considers from the outset that the dissolution of the "Bonis Potra" association unquestionably constitutes an interference with the exercise of its members' right to freedom of association' (author's translation).

1443 Ibid 8.

1444 Ibid 9.

1445 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* App no 34118/11 (ECtHR, 21 May 2013), para 59. See also *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 03 April 2012), para 94.

1446 On this see Chapter Eight, 406ff.

1447 *Radio France and others v France (dec)* App no 53984/00 (ECtHR, 23 September 2003) 23. This point is discussed in greater detail in Chapter Six at 334.

'bar associations, law societies or other lawyers' associations' to submit communications in relation to the implementation of judgments.[1448] Nonetheless, the Court clearly enunciated its restrictive position in the First Section's 2013 decision in *Ordre des Avocats Défenseurs*, where the eponymous Monaco Bar association challenged Moneyval-inspired anti-money laundering rules. The Court, after hearing extensive argument from the applicant, respondent, the CCBE, the Ordre français des avocats du barreau de Bruxelles[1449] and the Consiglio Nazionale Forense, set out in just over a page that the applicants, in any case, did not have standing.[1450]

Notably, in *Ordre des Avocats Défenseurs*, the applicant itself had interacted extensively with the question of its standing, aware of the difficulties in this regard and trying to secure a change in law.[1451] In particular, the applicant highlighted that under domestic law it was not classed as a public body[1452] and argued that its pursuit of a goal in the 'general interest',[1453] combined with the special nature of the legal profession which the European Court of Human Rights had highlighted elsewhere, justified giving it the ability to 'act against arbitrary infringements by public powers'.[1454] The applicant also argued that the fact that it was charged with

1448 Committee of Ministers of the Council of Europe, *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, CM/Del/Dec(2006)964/4.4-app4consolidated* (2022).

1449 Which readers will recognise from the Case C-305/05 *Ordre des Barreaux Francophones et Germanophone and others [GC]* [2007] ECR I-5305 judgment that led up to *Michaud v France* App no 12323/11 (ECtHR, 06 December 2012), discussed in Chapter Two, 115ff.

1450 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 55ff. This obviated any need to interact with the applicant's argument that the disclosure obligations in the anti-money laundering obligations violated Art. 8 in its 'professional secrecy' dimension, Arts 6 §§ 1, 3 and Art. 7 to the extent that the sanctions under the legislation were insufficiently defined, and is also the reason why the case was not included in Chapter Two in the section on 'gatekeeper' provisions.

1451 The latter point is particularly clear in the third-party intervention at para 45.

1452 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 32ff, reprising one of the criteria from *Van der Mussele v Belgium* (n 1302), para 29, and *Buzescu v Romania* (n 1070), para 78.

1453 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 33, 'poursuite d'un but d'intérêt général' (author's translation). This argument, however, given the reference in *Buzescu v Romania* (n 1070), para 78, may have also cut the other way.

1454 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 33 (author's translation).

maintaining discipline and enforcing the legislation at issue meant it should be able to challenge this legislation before the Court.[1455] Nonetheless, the First Section's decision was firm in rejecting these arguments, instead maintaining the classic position that Bar associations are not generally entitled to bring applications under Art. 34. Given both the potential problems that permitting Bar associations to bring claims in their own right could raise and the fact that the decision has been subsequently applied,[1456] *Ordre des Avocats Défenseurs* seems unlikely to be overturned in the near future.

Although the Court's own justification was laconic, one of the underlying reasons for the refusal to allow Bar associations standing under Art. 34 may well have been a desire to prevent strategic public-interest legislation, and indeed the Court in *Ordre des Avocats Défenseurs* explicitly noted that the applicant was effectively complaining about a violation of the rights of others.[1457] Nonetheless, the impact of the case law denying standing to Bar associations should not be overstated. First, Bar associations retain the ability to make third-party interventions, which some organisations are happy to use.[1458] Second, since the decision-makers in professional organisations will frequently be members of the legal profession themselves, it will often be easy for them to find a lawyer to bring a test case.[1459] Finally, the impact of this lack of standing is further reduced by the specific weight which the Court will give to the actions of Bar associations in its reasoning, which will

1455 Ibid, para 34. Again, given the Court's case law, this was more likely to cut the other way.

1456 eg *Bursa Barosu Başkanlığı and others v Turkey* App no 25680/05 (ECtHR, 19 June 2018), para 112ff, and *Halkların Demokratik Partisi v Turkey (dec)* App no 78850/16 (ECtHR, 03 November 2020) 16ff.

1457 *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445), para 61. Note that the Government attempted a similar line of argument in *Michaud v France* (n 1449), para 49.

1458 For example, the German Federal Bar Association has intervened as a third-party in several cases concerning Germany, including *Sommer v Germany* App no 73607/13 (ECtHR, 27 April 2017), para 5, or the recent applications in *Kock and others v Germany* App no 1022/19 and *Jones Day v Germany* App no 1125/19, which concern the compatibility with Art. 8 of a search of a law firm and seizure of documents and electronic data in the course of the automobile emissions scandal, while the French National Bar Council and Paris Bar Association recently intervened in *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022).

1459 A particularly good example being *Michaud v France* (n 1449), para 8, where the applicant lawyer was a member of both the Paris Bar and the Bar Council. The case also dealt with anti-money-laundering legislation and therefore featured many of the same arguments as *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445).

be discussed in greater detail below[1460] due to the arguably self-regulatory notions that underpin it. Rather than actually adversely affecting their position, the jurisprudence preventing Bar associations from bringing Art. 34 applications may therefore be more of an attempt to ensure that the line between State and non-State in the context of Art. 34 remains clear.

Despite classing Bar associations as part of the State, the Court reflects their special position between individual lawyers and the rest of the State in a different way, though not one that protects the individual lawyer: It seems that lawyers will generally enjoy a lower level of protection as against their own Bar association, and consequently Bar associations will have more scope for action without violating Convention rights than eg central government would. The clearest case on this is perhaps the 2018 admissibility decision in *Tuheiava v France (dec)*.[1461] In that case, the chairman of the local Bar association had been alerted to a number of irregularities regarding the applicant lawyer's practice, including a number of complaints by former clients amid significant difficulties in reaching him.[1462] In an effort to ensure that the applicant comply with his professional duties, the chairman visited his office and examined certain documents. Given that it had proved impossible to reach the applicant, this occurred in the latter's absence.[1463] The applicant considered this a violation of Art. 8.[1464]

The Committee noted several important points. First, applying the Court's constant jurisprudence, it reaffirmed that French Bar associations, for the purposes of Art. 8 § 2, were 'public authorities',[1465] which it based not just on domestic law, but also on the public interest Bar associations pursue: the promotion of legal assistance, combined with control of the exercise of the profession and respect for professional rules,[1466] the latter being the public interest in which the chairman had acted in the present case.[1467] The Committee then went on to find that this visit constituted an interference with Art. 8 of the Convention.[1468] This sits well with the jurisprudence discussed above, under which the dividing line between State and

1460 299ff.
1461 *Tuheiava v France (dec)* (n 1098).
1462 Ibid, para 2.
1463 Ibid, para 2.
1464 Ibid, para 8.
1465 Ibid, para 25.
1466 Ibid, para 25 (author's translation).
1467 Ibid, para 26.
1468 Ibid, para 26.

non-State runs between the individual practitioner and the Bar association, regardless of the latter's role in eg protecting their members against the State and ostensible claims of 'independence'.

After setting out the Court's case law on search and seizure at lawyers' offices, particularly as regarded procedural safeguards and the presence of third parties, the Committee then distinguished this case law by highlighting that in the instant case, it had been the Chairman of the Bar association himself who had conducted the visit in the course of an investigation in the field of disciplinary law.[1469] According to the Committee, there had consequently not been a risk to professional secrecy, since the Chairman was himself a lawyer subject to professional secrecy obligations, which his peers had even elected him to defend.[1470] The Court then highlighted that, quite to the contrary, the Chairman's visit had been intended to secure the relationship of confidence between a lawyer and his clients,[1471] and that this was the legitimate task of the Bar association. Given the importance of protecting the applicant's clients, the Chairman's visit had not been disproportionate to the goal pursued, rendering the application manifestly ill-founded.[1472]

To some extent, *Tuheiava* questions the foundation underlying the Court's reasoning on Bar associations. Overall, the Court has clearly rejected the idea that Bar associations are somehow fiduciaries of lawyers' rights, at least at the Convention level, and has instead consistently classed them as part of 'the State', at least in those jurisdictions where Bar associations wield a form of public power. This position has been criticised as not sufficiently reflecting Bar associations' important function of protecting their members – individual lawyers – against the State,[1473] a criticism further supported by the contrary position that the Court has taken as regards media organisations, where it has classed even public-law bodies as lying outside the State for Convention purposes due to the level of independence

1469 Ibid, para 31.
1470 Ibid, para 32. Noticeably, this re-introduces the opposition between the totality of lawyers and 'the State' that the Court had earlier rejected when classing the Bar association as a public body.
1471 Ibid, para 33.
1472 Ibid, para 35.
1473 cf eg *Ordre des Avocats Défenseurs et Avocats près la Cour d'Appel de Monaco v Monaco (dec)* (n 1445).

required for the media.[1474] Despite this arguably comparable situation, the Court has been consistent in maintaining a formal separation between Bar associations as being bound by the Convention guarantees, and individual lawyers as being entitled by them.

Nonetheless, while maintaining this formal separation, the argument adduced as to Bar associations' proximity to the interests of their members has still surfaced indirectly: The Court – as seen in eg *Tuheiava*, the decision just discussed – has highlighted the particular importance of lawyers' professional organisations. On the whole, it seems that lawyers' protection against their own Bar associations will be weaker than against other State bodies, which is in keeping with a tendency to concentrate questions affecting lawyers – for example regarding the limits of permissible speech[1475] – with Bar associations. That brings us to our next point: the extent to which Bar associations should themselves decide matters regarding the legal profession, or, to put it differently, the extent to which they should be self-regulating.

ii. *The 'independence' of Bar associations – self-regulation?*

The Court is clear that Bar associations generally form part of the State, not of civil society. Nonetheless, in the four cases mentioned above which feature the *Jankauskas (No 2)* dictum, it has also emphasised their 'independence' and their 'self-regulation', which is, in the Court's diction, 'paramount'.[1476] 'Self-regulation', of course, is a vague term, but there is nonetheless some indication as to how it is understood by the Court.

This is the second area in which *Tuheiava* is relevant: The Court's reasoning was based to a large extent on the Chairman's position as having been elected by his peers to fulfil the task of defending a variety of principles important to legal services. The Court, in *Tuheiava*, indicated that not only does it generally see this type of self-regulation as desirable, but even that it will be more hesitant to find Convention violations where it is a professional body so constituted which acts in relation to lawyers. In effect,

1474 *Radio France and others v France (dec)* (n 1447) 22ff, discussed in Chapter Six at 334.

1475 Chapter Three, 167, as well as 284ff.

1476 *Jankauskas v Lithuania (No 2)* (n 1110), para 78; *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60; *Namazov v Azerbaijan* (n 1058), para 46; *Bagirov v Azerbaijan* (n 1097), para 78.

it seems the Court will apply reduced scrutiny to matters that are 'internal' to the legal profession in the sense of concerning self-regulatory matters.

While *Tuheiava* is only a Committee decision, it fits well with an overarching tendency in the Court's case law to show particular trust towards lawyers' regulatory bodies. The Court, in the *Jankauskas (No 2)* dictum, called explicitly for (an undefined form of) self-regulation, but beyond this, the Court has also generally seemed to implicitly assume that the more lawyers are involved in matters concerning the legal profession, the better, particularly where these lawyers are elected by their peers. Even outside the rather specific situation in *Tuheiava* of the bâtonnier himself performing a search, the Court generally classes the presence of another lawyer and particularly a member of the Bar association as a procedural measure which pulls towards Convention compliance for searches of lawyers' premises.[1477] Similarly, in *Michaud v France* (2012), the Court attached great weight to the fact that 'lawyers [did] not transmit [anti-money-laundering] reports directly to the FIU, but, as appropriate, to the President of the Bar Council of the *Conseil d'Etat* and the Court of Cassation or to the Chairman of the Bar of which the lawyer is a member'[1478] and that this 'constitute[d] a guarantee when it comes to protecting legal professional privilege'.[1479]

Generally, the Court seems less likely to find a violation in cases where interference with the position of a lawyer flows from the actions of another lawyer. This is an interesting finding. It indicates that the Court seems to think that lawyers are particularly trustworthy, or at least more trustworthy than eg members of the executive.[1480] In its case law on search and

1477 See eg *Roemen and Schmitt v Luxembourg* App no 51772/99 (ECtHR, 25 February 2003), para 69ff; *Wieser and Bicos Beteiligungen GmbH v Austria* App no 74336/01 (ECtHR, 16 October 2007), para 9; *Iliya Stefanov v Bulgaria* App no 65755/01 (ECtHR, 22 May 2008), para 43; *André and another v France* (n 1094), para 43ff; *Jacquier v France (dec)* App no 45827/07 (ECtHR, 01 September 2009) 7; *Xavier da Silveira v France* App no 43757/05 (ECtHR, 21 January 2010), para 41; *Golovan v Ukraine* (n 1056), para 63; *Robathin v Austria* App no 30457/06 (ECtHR, 03 July 2012), para 49; *Brito Ferrinho Bexiga Villa-Nova v Portugal* App no 69436/10 (ECtHR, 01 December 2015), para 57; *Kruglov and others v Russia* (n 1158), para 132.

1478 *Michaud v France* (n 1449), para 129 (emphasis in original). The case is discussed in greater detail in Chapter Two at 115ff.

1479 Ibid, para 130.

1480 That this assumption may not necessarily be justified, as cases such as *Hajibeyli and Aliyev v Azerbaijan* (n 1203) show, is discussed below at 302ff.

seizure,[1481] the Court has at times explicitly underlined that the bâtonnier did not make any complaints.[1482] In addition, as regards more generalised action, the Court, in its line of cases on professional secrecy in Moldovan prisons, gave significant weight to the many strikes by the Moldovan Bar association, moving from an initially hesitant position[1483] to later finding Convention violations.[1484]

Moreover, a particularly clear example of this emphasis on the assessment of other lawyers arises in relation to disciplinary law: In cases that do not concern disciplinary proceedings themselves, but sanctions by other State bodies which attach to lawyers' behaviour, the Court will frequently attach significant weight to whether the Bar association thought it necessary to take disciplinary steps against the lawyer concerned. This preponderance of disciplinary law introduces an element of self-regulation in the sense of concentrating the assessment as to the severity of a breach of professional duties with the Bar association. Where the Bar association did not think disciplinary sanctions were necessary, the State will have a harder time showing that they were.

In keeping with the Court's focus on lawyers' freedom of expression,[1485] this is particularly clear in those cases concerning controversial statements made by lawyers. In these cases, the Court has often made reference to the outcome (or absence) of disciplinary proceedings by the Bar association in assessing whether a criminal conviction constituted a violation of Art. 10. In *Bono v France* (2015), the Court highlighted that 'the judges had not considered it appropriate to ask the Principal Public Prosecutor to refer

1481 Chapter Two, 110ff.

1482 *Turcon v France (dec)* App no 34514/02 (ECtHR, 30 January 2007) 24.

1483 *Sarban v Moldova* App no 3456/05 (ECtHR, 04 October 2005), paras 126, 130, in which the Court found no violation. The cases are discussed in Chapter Two, 104ff.

1484 *Oferta Plus SRL v Moldova* App no 14385/04 (ECtHR, 19 December 2006), para 149; *Modarca v Moldova* App no 14437/05 (ECtHR, 10 May 2007), para 91; *Istratii and others v Moldova* App no 8721/05 and others (ECtHR, 27 March 2007), para 93; *Cebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007), para 62; *Castravet v Moldova* App no 23393/05 (ECtHR, 13 March 2007), para 93. Confirming the weight this had in the Court's reasoning see *Apostu v Romania* App no 22765/12 (ECtHR, 03 February 2015), para 100.

1485 See Chapter Three, 154ff.

the matter to the disciplinary bodies',[1486] and in *Morice* it noted 'that neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility was open to them'.[1487] Similar references by the Court that disciplinary authorities had not classed a certain form of behaviour as requiring disciplinary sanctions and that the behaviour could therefore not be particularly serious also appear in a number of other cases,[1488] and the Court even noted that contrary to the Government's suggestion, it could not completely ignore this fact in *Radobuljac v Croatia*.[1489] Particularly where the other set of proceedings is a private prosecution[1490] rather than one instituted by a more neutral authority, the Court will typically take a position rather more protective of lawyers.[1491] In a related form of reliance on the position of domestic Bar associations, the Court has also used subsequent disbarment as an indicator that legal assistance in earlier cases did not satisfy the client's rights (in violation of professional rules).[1492]

The Court therefore gives particular weight to the position Bar associations have taken, in effect reflecting the core idea of self-regulation that lawyers are best-placed or at least particularly well-placed to judge the behaviour of other lawyers. However, this position is based on an unspoken assumption: the assumption that the Bar associations are indeed pursuing the public-interest goals that they should be pursuing. Where this is not the case, rendering them independent is likely to only aggravate matters, as is clear from eg *Turczanik v Poland* (2005), where the Bar association, whose 'authorities were clearly determined to disregard a decision given by a competent higher court',[1493] appears to have relied on its independent status to shield it from the applicant's attempts to seek legal redress against extensive feet-dragging in processing his application to join the Bar.

1486 *Bono v France* (n 1259), para 55. And indeed (para 19) 'the Disciplinary Board of the Paris Bar Association [had] dismissed all the charges against the applicant' initially.

1487 *Morice v France [GC]* (n 1070), para 173, discussed in Chapter Three, 173ff.

1488 eg *Mor v France* (n 1098), para 60, concerning litigation secret.

1489 *Radobuljac v Croatia* (n 1097), para 68.

1490 Or indeed, as one sometimes has the impression in cases such as *Foglia v Switzerland* (n 1098), para 27, or *Mor v France* (n 1098), a potential SLAPP lawsuit.

1491 See eg *Mor v France* (n 1098); *Nikula v Finland* (n 1061).

1492 *Utvenko and Borisov v Russia* App no 45767/09; 40452/10 (ECtHR, 05 February 2019), para 183ff, discussed in Chapter Two at 79ff.

1493 *Turczanik v Poland* (n 1277), para 51.

Similarly, the Court's emphasis on Bar associations will only work where these actually are sufficiently independent. Without this, 'self-regulation' is in fact different to direct regulation in name only, and involving other lawyers that are not independent from the State will add little by way of protection. While there are a number of cases where Bar associations have tried to protect their members against State authorities,[1494] there are also more problematic cases, in which it is not clear that the Bar association was acting in the interests of upholding the rule of law. As such, it is noticeable that in *Igor Kabanov v Russia* (2011), one of the few judgments where the Court did *not* follow the Bar association's assessment,[1495] there were also significant doubts as to the independence of the Bar association.[1496]

A case in which this problematic dimension of Bar associations' independence arose particularly clearly is *Hajibeyli and Aliyev v Azerbaijan* (2018),[1497] in which the Court also highlighted limitations on self-regulation in the sense that domestic law must provide clearly for reasons to refuse accession to the legal profession, rather than simply leaving the question of whether or not to admit candidates to the Bar association's unfettered discretion. In *Hajibeyli and Aliyev v Azerbaijan*, domestic rules provided simply that 'the Presidium of the [Azerbaijani Bar Association] deals with matters related to admission to the ABA', and that it took decisions in the presence of two-thirds of its members and by simple majority.[1498] The Government submitted that this was a sufficient legal basis to refuse to admit the applicants to the Bar,[1499] similarly to the domestic courts, which 'also failed to provide any reason for the refusal to admit the applicants to the ABA, finding that it was a matter falling within the exclusive competence of the legal profession'.[1500] The Court, on the other hand, noted that it could not

1494 Cases such as *Bono v France* (n 1259), para 22, where the Chairman of the Paris Bar association appealed against a decision issuing the applicant with a reprimand, and *Reznik v Russia* (n 1096) (discussed in the section on lawyers as public watchdogs, Chapter Four, 208ff) spring to mind.

1495 The applicant was disbarred by his Bar association, a decision which the Court did not find 'commensurate with the seriousness of the offence, considering the alternatives available', cf *Igor Kabanov v Russia* (n 1096), para 56.

1496 In ibid, the relevant Bar Council copied large parts of the President of the Supreme Court's complaint word-for-word into its disbarment decision.

1497 *Hajibeyli and Aliyev v Azerbaijan* (n 1203).

1498 Ibid, para 38.

1499 Ibid, para 56.

1500 Ibid, para 59.

> accept the Government's and the domestic courts' argument, which would deprive lawyers of any effective protection in respect of the Presidium's possible interference with their freedom of expression by refusing to grant them access to the legal profession on grounds not envisaged by the relevant domestic legislation,[1501]

and that therefore 'the interference in question was not 'prescribed by law' within the meaning of Article 10 § 2 of the Convention'.[1502] It seems, then, that at least the question of who to admit to the legal profession cannot be left to self-regulation on a case-by-case basis, but must have a basis set down in law; moreover, the case underlines States' responsibility for Bar associations, since in the instant case the Court attributed responsibility to the State even where the Bar association's discretion had been totally unfettered under domestic law. Together with *Namazov v Azerbaijan*, where the Court noted that it

> [could not] overlook the fact that the Presidents of the disciplinary commission and the [Azerbaijani Bar Association] openly criticised the applicant for his frequent appearances in the media and his affiliation to an opposition political party, which were not related to the subject matter of the disciplinary proceedings instituted against him,[1503]

these examples show that independence for Bar associations will not automatically mean that these pursue the interests of a functioning legal profession.

As regards self-regulation, it is moreover noteworthy that there is a certain disconnect in the Court's reasoning. In full, the *Jankauskas (No 2)* quote reads as follows:

> In that connection, the Court also reiterates that professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently …, and that respect towards professional colleagues and self-regulation of the legal profession are paramount.[1504]

1501 Ibid, para 60.
1502 Ibid, para 61.
1503 *Namazov v Azerbaijan* (n 1058), para 49.
1504 *Jankauskas v Lithuania (No 2)* (n 1110), para 78. The wording in *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60, *Namazov v Azerbaijan* (n 1058), para 46, *Bagirov v Azerbaijan* (n 1097), para 78, does not differ notably.

However, independence does not necessarily require self-regulation, it merely requires independent regulation.[1505] The latter does not necessarily mean that lawyers must regulate themselves, it merely means that their regulation should, to the extent possible, be shielded from improper interference by other public authorities. There are also other arrangements which can ensure this,[1506] and indeed, given the risk of regulatory capture discussed above, past years have shown a certain willingness to reconsider whether the legal profession should be self-regulating. However, once again the Court seems to treat 'Bar associations' as largely monolithic, noting in *Hajibeyli and Aliyev v Azerbaijan* that 'Bar Associations perform a self-regulation function',[1507] which, while true for some Bar associations, will not necessarily be true for all.

In keeping with this emphasis on self-regulation, the Court sees no difficulties with legislation that imposes a single, exclusive system of Bar associations in the interests of strengthening regulation and the protection of individual lawyers by ensuring that there can be no competition between Bar associations.[1508] In *Bota v Romania (dec)*, the applicant had decided to create an association called the 'Romanian Constitutional Bar',[1509] pass himself off as a 'Bar member' and offer legal services on this basis.[1510] On an action by the Romanian Union of Lawyers, the statutory Bar association, this association was then disbanded for pursuing unlawful aims. The Court held that dissolving the organisation had pursued a legitimate aim, since the domestic courts had based their judgment on the importance of the role assigned to lawyers in the justice system and the necessity of securing the quality of legal assistance and had therefore served the prevention of

1505 For the Court's position as regards regulation of audiovisual media see eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), particularly at para 222, discussed in Chapter Six, 323ff.

1506 For an introduction see eg Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar Publishing 2013).

1507 *Hajibeyli and Aliyev v Azerbaijan* (n 1203), para 60.

1508 For a controversial proposal in Turkey see eg Human Rights Watch, 'The Reform of Bar Associations in Turkey: Questions and Answers' (2020) <https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers> accessed 08 August 2024; for the problematic situation in Ukraine see eg International Commission of Jurists (n 1441) 12ff. In the Court's case law, the problem formed the backdrop to *Amihalachioaie v Moldova* (n 1096), para 9ff.

1509 *Bota v Romania (dec)* (n 1440) 2.

1510 Ibid 3.

disorder or crime as well as the protection of the rights of others.[1511] In particular, the Court highlighted that since the members of the association had assumed for themselves powers which had been within the exclusive competency of the Romanian Union of Lawyers dissolving the association had been proportionate. Nonetheless, the events leading up to the subsequent admissibility decision in *Ţuluş v Romania (dec)* indicate that the 'Romanian Constitutional Bar' must have kept operating until at least 2011.[1512]

On the whole, there is therefore evidence to support the conclusion that the Court takes a positive view of regulation of lawyers by other lawyers. This is clear not only from explicit statements focusing on the ambiguous term 'self-regulation', but also from the general tendencies of the Court's case law. In general, where interference with lawyers' rights emanates from other lawyers or from structures elected by them, it will be easier for States to justify such interference. Notably, this is the case as regards criminal sanctions attaching to lawyers' freedom of expression: Where the relevant disciplinary body has not seen fit to institute disciplinary proceedings, the Court has tended to see this as an indication that the statements did not merit criminal sanctions either. This case law therefore privileges States that secure the independence of the legal profession, which the Court has called for elsewhere, by entrusting that profession with its own regulation.

III. Conclusion: The public interest in legal services in the Court's case law

In addition to case law protecting the client's (Chapter Two and Chapter Three) and the lawyer's (Chapter Four) private interests in legal services, the Court's case law therefore also reveals some awareness of the public interest in legal services. This manifests both in more abstract explanations of the significance of legal services to the Convention (discussed in this chapter at I.) and in a number of more specific lines of case law in which the Court has discussed how States should best reflect the public interest in legal services (II.), which concern, for example, the regulation of the market for legal services and a separate administrative regime for lawyers.

From the perspective of lawyers, this case law reflecting the public interest in legal services can lead both to elevation and to additional restriction of rights. The Court has gone to great lengths to emphasise that

1511 Ibid 8.
1512 *Ţuluş v Romania (dec)* App no 23562/13 (ECtHR, 17 December 2019), para 4.

lawyers and the legal profession are special both in terms of their legal status as 'officers of the court' and their 'central role … in the administration of justice and the maintenance of the rule of law'. In line with this particular importance, the Court has made a number of oblique statements regarding matters such as the extent to which legal services can or should be regulated and how such regulation should be organised in terms of administrative law. On traditional analyses of human rights, which largely see human rights in terms of what they do for the rights holder,[1513] this case law is not easy to explain, since in essence the Court argues by reference to what the lawyer's rights do for other people. After a brief comparison to the Court's case law on the media,[1514] where rights holders similarly fulfil important functions in the interests of others, the remaining chapters of this study provide a more general critique of the Court's approach to public interests under the Convention and explore whether there are other, more convincing, alternatives.

1513 See Chapter Eight.
1514 Chapter Six.